

The Litchfield  
Historical  
Society.

1898

1915<sup>36</sup> 2

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# Real Property.

In the first place, how are you to distinguish between real and personal property? I have never seen a definition of real property which conveys all the ideas necessary to be conveyed. Sometimes they say it is immovable, and personal property is not. But a man may have an estate in lands which is not a real estate as an estate for years.

Again, it is said that property which goes to the heir is real what to the Executor personal. But you must first determine what goes to the heir. A life estate which is a freehold does not go to the heir Executor. Thus far is true. I know of no definition which comprehends all. We must find out what it is as we proceed. This real property is divided into corporeal and incorporeal hereditaments. The former is comprehended by the word land. An incorporeal hereditament is a right which a man has which can't be seen or touched. But it is a right which arises, property and ordinarily issues out of some corporeal hereditament. But what is land is not only every thing called so in common parlance, but it includes all water

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upon the land and every thing growing upon it, adhering to it naturally, every thing upon it, produced upon it by labour as houses, fences &c. These all pass by the term land. An incorporeal hereditament differs from this.

Suppose a man owns a right of way, this is real estate and is descendable. This is an interest but no interest in the soil.

So a man may have a right of fishing in certain waters - this is transferable and descendable also. That great estate in Eng<sup>d</sup> of tithes is an incorporeal hereditament. Indue certain offices in Eng<sup>d</sup> are a species of property.

I will now take more notice of the word heir - when a man gives an estate to a man and his heirs forever, what is meant by heirs? have they any interest in the estate? No he has no heirs till he dies & nothing then is given to any body but he, & may do any thing he chooses with it. What then does the term heirs mean? It does not dispose of it by will or in his life time it will go to his heirs. It is only used as a description of the quantity of interest, or the estate given. This is not an estate given for life or for years, but it is a fee. And if you add of the body, it only shows that no other heirs but those of his body can have it.

It may be matter of curiosity to enquire what we copy

There is to use the word *heir* to show that a fee was conveyed. Why can't he consider it a fee without this word; there is now no reason for it.

Lands were formerly parcelled out to Soldiers as estates at will. Afterwards the Lords let them have it for a number of years, at length an estate for life was given and for a long time every body supposed that lands were not conveyable for a longer term than for life. The peculiar situation of the feudal establishments and the happy concurrence of circumstances contributed at length to voluntary alienations of estates in fee simple. The word *heir* has been used almost from time immemorial as descriptive of the intention of the grantor.

Upon the introduction of the feudal system under W.<sup>m</sup> lands became not to be devisable universally except in a few villages where they were permitted to devise in contradiction to the common law. Long before the Stat Hen<sup>3</sup> 8 ingeniously found out a way to devise lands. The plan was invented by the clergy for a particular purpose, and afterwards made subservient to other purposes.

As to the extent of the word *heir* under the feudal system it extended no further than his issue, persons lineally descended from his body. The rule was then introduced that it

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might go to any person whatever, when it had passed one de-  
scendant who was descended from the first grantee. Consequently  
any person who descended from the first purchaser might in-  
herit it. This is not the law now, for by a fiction they have  
let in all collaterals in their order. For in Eng every feod  
which a man purchases shall be considered as a feodum  
antiquum.

It was an old idea that an estate conveyed by the word  
"heirs" if he had heirs of his body was a fee simple, and if he  
had none was an estate for life only. So if they had children  
they could devise it. This construction was unifying to the no-  
bility and they endeavored but in vain to get a law pas-  
sed to regulate it. Edw 3, however came into the views of  
the nobility and extended aid by passing the Stat. de donis,  
which declared that lands were unalienable and must des-  
cend from generation to generation. This was found a great bur-  
then, and all lands were becoming estates tail. This law they  
dispensed with by entailments. This was a new finesse but it  
prevented effectually estates tail.

The way was this. B had an estate tail he wishes to dispose  
of it. He goes to C and denies him to sue him for it, and  
promises to make default. C brings the suit and there is a  
proceeding in Court. B makes default, judgment is that C re-



recover the land then gives B a deed. another method which I will mention hereafter. So that now the Stat de donis is completely frustrated. The manner in which the several species of estates have been created it is necessary to mention. When the Northern nations broke in upon the Roman empire they had no idea of lands as we now have. They all supposed the power of distributing lands to the soldiers was vested in the chief man. The manner was by distributing to his principal followers, and they to their followers. They then had no idea that their followers had any right to these lands except the right to occupy them at the will of the Lords.

This was the origin of the feudal oath of allegiance or fealty by which they promised to serve their lords faithfully in their wars and to attend their barons in their courts to assist in settling controversies. It was then only an estate at will. Times growing more peaceable they obtained leases for years which were for a short time - by insensible degrees these lands changed into estates for life, for the life of the grantor, & this was the utmost capacity which land was supposed to have. Men now began to receive, they had a property in lands, and this was the reason why an estate given to a man without other words was considered as an estate for life.

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which remains to this day. The next step was to have their lands descendable to their children. This they were very desirous to obtain and it was necessary that some particular words should be used to express it and they introduced the word heirs, and the estate now became descendable to their children. Here they were very desirous to obtain, and it was necessary that some. It was not alienable or transmissible at this time. The word "heirs" legally includes all the heirs a man may have to the end of time. But this was not the idea attached to it at this time, it only meant his children. The process of time it became descendable to any heirs who were of the whole blood of the first purchaser i.e. who descended from him. It is at length settled that any purchased land shall be considered a fund of indefinite antiquity, it can go to any relation under heaven, and it can descend to any relation either in the lineal or collateral line provided they are of the blood of the first purchaser. But when it can be actually demonstrated that it did not come from the maternal line, those in the paternal only can take it and so vice versa. But estates were not alienable or devisable at this time. The course of this business was gradual. An estate which a man had purchased himself, to himself and heirs became after a while alienable in part, at first one quarter, afterwards one half,



and finally a man who had purchased an estate to himself, he and his heirs could alien the whole. Presently it came to pass that a man might alien one fourth of his descendable estate, then one half and no more. Finally, the Stat. 18. Edw. 1. Stat. quia emptores gave a man full and complete authority to sell the whole estate and there was no exception but this, the land being held immediately from the owner could not be aliened without purchasing a licence, and this was finally withheld by Stat. Car. 2. The idea of lands being alienable by the owner was a rare thing to the nobility. They saw their property going into the hands of the common people who were growing into consequence by it. The adherents of aristocracy were very desirous of preventing this, and they made conveyances by which they supposed they could limit it to the heirs of their bodies, and so that it could not be aliened. They supposed the grantee could only have it for his own life and that his heirs would certainly have it. This answered the purpose for a considerable time, till finally the court said they considered the estate a fee simple conditional, so that the moment the grantee had children born, he had performed the condition and might alien it. They were thus completely frustrated. The estate became fee simple, over

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which the grantee had absolute power when he had children afterwards the nobility invented the Stat de donis, by which this construction was done away, and the whole estate became again completely fettered by the entailment. A method has been devised to destroy these entailments which has succeeded and which will be mentioned hereafter. Still if the method is not pursued the entailment goes on from generation to generation.

Thus if an estate is given to A and his heirs it is a fee simple, if to A and the heirs of his body it is a fee tail, if to A merely, tis an estate for life, if for a certain number of years tis an estate for years, if for no specific time, it is an estate at will, and if the grantee holds over after the estate for years has terminated it is an estate at sufferance. These are the only kinds of real estate and no other can be given.

Before I proceed to consider these estates I will make a few observations on alienation by will. They never became devisable as such till 32 Hen. 8. It is true they were devisable under the Saxon Kings but the feudal system was not then in its rigor. Long before the Stat Hen. 8. the ingenious clergyman invented the method of devising lands which produced the desired effect. Indirect devises through the medium

of a vesting use trust. Men on their death beds were willing that their lands should go to religious houses. This they could not do, but they could devise the use and a court of Chan<sup>y</sup> compel the performance of the use. To prevent the evils arising from this a Stat was made declaring all gifts of this kind to corporations of any kind to be void. But the practice now inserted was now used for a different purpose. During the contention between the houses of York and Lancaster, men who were about to take oides being willing to provide for their families would convey their lands to some persons for the use of their families so that they might save them from forfeiture, for a use was not forfeited in treason. So they would often convey, to themselves for the use of their families. It is said almost all the lands in Eng. were in this situation at this time the legal properties being merely nominal and the use belonging to another or others. This introduced difficulties and Stat 27 Hen 8<sup>th</sup> was made declaring that the vesting use should be the legal owner of the land. The Stat transferred the legal title to him ie it gave him a legal title, vested a fee simple in him. From this it followed they could not provide for their families. The spirit of the nation would not bear this, 25 years afterwards the 32 Hen 8<sup>th</sup> a Stat was enacted making lands devisable, and the 34 regulated and explained the former. Before this, certain, technical rules had obtained with respect



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to the construction of terms made use of in conveyances by deed, which technical rules were always to be adhered to, let the intention of the grantor be what it would. Upon the establishment of wills these rules were separated from and a new rule was introduced which is the forte star to guide us. That the intention of the Testator is to govern. As a different construction is given to the same words where used in a deed and when used in a will. In the case of deeds the intention yields to the technical terms. In case of wills the technical terms yield to the intention, and the rule has a qualification to it viz. that the intention of the Testator to govern must be consistent with the rules of law. This ought to be thoroughly understood, for if as some have supposed it was to extend to the words that are used there never could be any difference. The truth is this restrictive clause only applies to the nature of the estate and not to the words made use of. A man may make use of any words to convey an estate by will if his intention is clear provided he must by those words convey an estate which by the rules of law he cannot. As he can't give an estate tail in personal property, or a fee simple without power of alienation. But suppose he give an estate to J. A. and his heirs male, is this a good devise? What is his intention. To give it to J. A.

and his heirs male in exclusion of females, tho he cannot do and his intention is not to be gratified. Hence it is that any words that show an intention in the deviser to give a man an absolute right over an estate is a fee simple in a will but as has been stated is not so in a will deed.

Hence it follows that if a man says I give in fee simple or all I am worth, or all I am worth my estate, it is a conveyance of all his interest. So the truth is if the estate is such an one that it can be given, any words which show the intention are sufficient. So if A gives to D. N. and his issue it is an entailment in the will. The word heirs don't mean a description of persons, it is only a description of the quantity of estate, and it means any person who may be heir to the heir by the law of the land at the death of the grantee or devisee and you may use heir as well as heirs. So when lands are holden in gavelkind it means all the sons. In the United States it means all the children male and female.

I will consider 1<sup>st</sup> how this estate is vested - 2<sup>nd</sup> by its qualities and incidents, and 3<sup>rd</sup> what will become of it provided he has no heir.

A fee simple can never be created by deed without using the word "heirs", and the ancient idea was that

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words of perpetuity as well as inheritance forever should be used. Codrill

The modern rule explodes this idea, "to him and his heirs" conveys it forever. This estate may also be created by will by making use of any terms whatever that are clearly indicative of an intention to create a fee simple, as an estate to a man forever &c

### The Qualities of this Estate.

It is descendable to his heirs general i.e. if the proprietor exercises no power over it in his life time, except the use of it, and then dies, it goes to his heirs general i.e. to any person that is related to him unless restricted by the laws of the land.

It is descendable to his issue and if he has none to his nearest collateral relations, and there are certain rules which govern on this subject which will be noticed hereafter.

2<sup>nd</sup> This estate is alienable by the holder at his pleasure, no right of the heir is wounded, for "heirs" is not descriptive personae.

3<sup>rd</sup> It is devisable at pleasure; he may cut off all his heirs if he will give it to a stranger. Now it is impossible to carry the intention of the testator into execution if he endeavours to create a fee simple, and attempts to deprive it of any of their qualities, as if he gives an estate to his heirs on his brother's side - this will is good, but the heirs who are



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so by the laws of the land will take, for the words on "the  
another side" are void to all intents and purposes - it is cre-  
ating a fee simple, and depriving it of one of its qualities.  
So a man can't give an estate to it and his heirs male without  
using words of prohibitory and then it makes another estate, which  
is not a fee simple. We see then the power a man has over  
this estate. Co Litt 13.

3<sup>d</sup>. But what becomes of this estate, if he does not alien it,  
or devise it having no heirs? By the Eng<sup>l</sup> law it reverts, it  
goes back to the original grantor, it goes back to the heir of  
the grantor i.e. heir of the lord of the manor. This the law has  
done to prevent it from becoming an estate by occupancy.  
In this country we have no escheat, because the feudal idea does  
not exist here. It becomes the duty of a Public officer to look  
into it, and if he finds no heirs to sell it, and put the profits  
in the public treasury. Our possessions here are strictly allodial,  
there is no authority over them by the grantor when sold,  
unless specially reserved, as was done by Penn in Pennsylvania,<sup>a</sup>  
and Fairfax in Virginia - and where there are no officers  
to sell it, it is open to the first occupant.

The incidents to this estate are subject to the wife's dower  
which can't be taken away from her in any manner upon  
the principles of the common law. If a devisee or grantee have

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it, he has it with this intestate. True they have adopted a mode of proceeding there by which his consent is obtained and the dower is set off. But the right of dower is paramount to all other rights.

This estate is liable to the curtesy of the husband when she owns it - it is a life estate which he may have under certain circumstances to be mentioned hereafter. This fee simple estate may not only be lands (as such) but also any incorporeal hereditament, and also other real property exclusive of the soil may be given in fee simple because it goes to heirs. As if I. C. conveys to J. S. all his wood and timber growing on his farm black acre reserving the soil to himself. This is a real estate and goes to the heirs of J. S. not to Executors. § 6

I will now mention some exceptions to the rule when in case of heirs i.e. when an estate may be granted by deed without using the words.

An estate to corporations will pass by using the word "successors". But the word is not of the same import in this grant as heirs generally is, for it is given to a corporation forever, with successors it passes a fee.

2<sup>d</sup>. It conveys to B and his heirs forever, B conveys back again in these terms "as fully as it conveyed to B" without using heirs. This passes the estate. I don't think it is an exception. But had B conveyed to C in this manner it would have answered.

3<sup>d</sup>. Parceners or joint tenants may release to each other

their right without using the term heirs. These are all the exceptions I know of. Co Litt 9

I will now consider an estate tail - how it is created - what its qualities are - what its destiny must be, and its incidents.

An estate tail is created by deed only one way, by grant to A and the heirs of his body, tho it may be restrained to particular heirs of his body. But no restriction can be laid in an estate which is to go to the heirs general. But the law admits an estate tail to be created, and this by force of the old Stat. de Donis. Co Litt 20. In the State of New York they have abolished estates tail altogether. But the estate may be created by will and here the intention is to govern. Any words may be used which shew an intention to convey an estate tail as to J. S. and his issue, or his seed, to J. S. and it is to be deemed an estate tail from generation to generation.

The qualities are, he can never alien or devise it. Indeed he may sell his own right by operation of law, but can't bar the issue. It is descendable not to his heirs generally, but to heirs of his body, not indeed to heirs generally of his body, tho it may be, and then it is an estate tail general. But it may be to A and heirs male of his body and then no others can take it. Here is an estate male tail. It may be an estate tail female.

If given to A and heirs of his body by his present



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wife, to an estate tail special, if it is given to him and hers male of his present wife - his male tail special - and so female.

Here it must be observed that the conveyance in order to be good must be conducted wholly through the channel of the gift Ed. 25.

Of its descent in case there are no heirs who can take it. In this case it goes back to the Grantor, for the fee tail was carved out of a fee simple - the fee remaining in the Grantor which descends to heirs of the Grantor, who shall take it.

Of the incidents of this Estate.

The tenant has a right to do with it as he pleases - respecting improvements - may commit waste with impunity. Is liable to dower of the wife and the heirs take it liable to this condition. Is liable to Ctesy -

It may be barred and turned into a fee simple by fine and recovery.

Of entailments in Connecticut.

The object is to prevent the immediate issue from spending the estate of course it can't be barred. So if it gives to B and heirs of his body to an entailment. B holds it as an entailment. But the moment the Grantee dies, it descends to his heirs a fee simple.

Some say the estate in B is only an estate for life, and is not subject to dower or ctesy, But I answer the Stat by using the word entailment - take it in the sense of that term in the English books. So to an entailed estate. Besides if there were not an

entailed estate, it would not follow the form of the gift but would go to their general in all instances. But this is not a fact where the estate is for life. Both these estates are called estates of inheritance because they descend.

### Of Estates for life.

There are conventional, or those created by construction or operation of law. Conventional are sometimes for the life of the grantee and sometimes for the life of another person. If given for life not mentioning whose tis considered as for life of grantee, it being taken most strongly against grantor.

How conventional Estates are created i.e. by what words, its qualities, incidents, and destiny.

As to the words to be used, I observe first if for life of grantee, he is to use "life" only. It wills the intention is to govern, yet a man gives his farm, i.e. a thing per se, it passes only an estate for life, or if he says my house. If an estate is given which may last for life tis considered as an estate for life.

So if to Susan during her widowhood tis an estate for life, or so considered because she may be never married.

When an estate is given to a man for the life of another if the grantee dies before the vesting *que vie* - what becomes of it for the grantee shant have it, for he has parted with the whole of his interest in it during the life of vesting *que vie* - shant go

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to the Executor because his real property - can't excheat because  
a fee simple - well it is hereditas given open to the first oc-  
cupant - while the testator *que* *vie* lives. Now a Stat is made in Eng.  
which gives it to the Exor.<sup>d</sup> to sell and pay debts. There is no  
such Stat in Connecticut. to Little 41.

Of life estate by operation of Law.

By the country this is a life estate for it may last during  
life. If he alienates it it operates no longer than during the  
coverture - So if creditors take it, to if leased for 100 years, it  
is good only during the coverture if he dies first, but if she  
dies it's good during his life.

Dower.

This is an estate of real Property to which the wife is entit-  
led on the decease of her husband. I will first mention the  
Eng<sup>l</sup>. law only, in the U. States the Law on this subject is  
quite uniform.

The wife has a right to one third of all the real property  
of inheritance which the husband was at any time seized of  
during coverture, to hold to her for her natural life, provided  
she could have had issue, and that issue could have inherit-  
ed by law. Not necessary that she should have had issue.  
Her right to this estate can never be disposed of by the husband  
either by deed or will nor indeed is it in the power of the hus-  
band to alter her right and give her any thing in lieu of it.



only by her consent. Her title is paramount to all others. Again it can't be taken by his creditors. He can't deprive her of it by any agreement during coverture. She is not bound by any jointure after marriage, but if she accepts of one it is a bar to dower.

She has no right to her personal property if he chooses to deprive her of it. His creditors or devisees can take it before her, but if he can't alien it  $\frac{1}{3}$  of it is completely at her disposal, but she has real estate only for life. Dower is a right that lasts only during her life, if he alien it under this circumstance. It can't be taken by one action. Where a man married a woman above 30, the court said 'twas not certain she could not have dower. Where an estate is given to A and the heirs of his body on his new wife Mary to be begotten, if Mary dies and he marries Susan, he can't be endowed of that estate for her children could not inherit. The estate must be a fee or in tail in order to her being endowed of it. He must have been seized during the coverture, either in deed or in law. Seisin in law is sufficient for her to recover her dower. The seisin must not be instantaneous as if it conveyed to B on purpose that he should convey to C. Here the wife of B is not to be endowed, for he is a mere trustee for another person. On this account the wives of mortgagors are not to be endowed, the formerly it was otherwise.

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To be entitled to dower the wife must be 9 years old. A divorce *mensa et thoro* does not cut off her dower say tho there is a ground for a divorce a vinculo matrimonii, yet unless this takes place before his death she can't be endowed.

In case of a 2<sup>d</sup> marriage (the first wife living) that is void & not merely voidable as to the other, and of course the 2 wife can't be endowed.

Formerly, treason or felony in the husband destroyed the right of dower at common law and by another that his so now as to treason. But by a Stat the wife of a felon can be endowed.

The wife of an alien can't be endowed, for an alien can't hold lands. The Judge queries whether she can't if the inquiry is not made as to his alienage before his death and after his death there is no danger of the enemies being aided. It also an alien woman can't be endowed, for can't hold lands except Queen's consort.

The wife of a Dissident shall be endowed, tho the title is liable to be forfeited, for the husband died seized. The wife of joint-tenant shan't be endowed for the whole right survives to the survivors.

This dower is to be set out by the law with metes and bounds; if she don't like his proceedings, she is to bring a writ of dower and then his determined.

If the thing is incapable of partition as a will, then she must take one third of the toll or the like.

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The wife of a copy free tenant shall be endowed. This is wrong  
for the wife of the free tenant can't be endowed.

Dower in Connecticut.

The wife has a right of dower of all the land of which the husband died seized, and not that of which he had <sup>been</sup> seized during coverture. This is the law of some of the Eastern States. New York law is the same as England except that by joining in a conveyance, she can bar her dower.

When a man in Connecticut in order to cut his wife off from dower conveyed his lands to his children just at the time of his death the Court considered it as a testamentary disposition which would not cut off dower. To be sure if he chose to turn his estate into money and then devise it from her, he can cut her off.

At divorce in Connecticut a vinculo matrimonii dower of course prevents dower, for it may be for perjurament-cause.

I presume no conviction or treason would bar dower in Connecticut for it don't corrupt the blood. In Connecticut by usage there are no joint tenants, they are just like tenants in common.

In New York there can be no joint tenancy unless it is expressly declared.

Our court of Probate appoint two or 3 judicious men who set out her dower. Now a wife shall be endowed of a trust estate. Lo Litt 30. 34. 40. 11 Co 25. Dow 151. Roll 676. 681.

How barred. The most common mode is by jointure settled upon her before marriage, while she was sui generis. The jointure



Dower.

to bar must be expressed to be in lieu of dower, otherwise it shall be considered as a mere marriage settlement.

Qualities of a good jointure.

It must be of real property i.e. fee simple, tail, or for life of the wife - not personal property. Tame in Connecticut. Indeed a lease of 999 is considered here as real property - so of any long lease. It must be for the life of the wife at least. At common law jointure was so bar like that, unless indeed, it was ad ostium ecclesiae. It must commence in possession, profit by rent immediately after the death of the husband.

It must be a competent livelihood. It is very proper that the Law should thus take care of her interest, for possibly she married young &c. It must be in proportion to her circumstances in life. May tho at the time of the contract the jointure was sufficient yet if he had grown rich, this must be increased accordingly.

It must be conveyed to her and not to trustees for her.

Jointure settled after marriage is not binding if she chooses to avoid it. A devise of land to wife don't bar dower tho accepted, unless stated to be in lieu of dower. But in Connecticut I suppose a devise of  $\frac{1}{3}$  of all my real estate for the life of my wife, would be construed to mean be meant in bar of dower, and to have been given through the ignorance of the deviser who supposed she could not.

take without a devise.

If she should be evicted off the land thus settled, she may  
sue to her dower again. Co Litt 36. 461. 11th 56. 46 125. 46 3.

Dower may be barred by coverture with an adulterer, and also  
if she goes away alone and lives with an adulterer. Co Litt 32.  
She has her dower if her husband becomes reconciled to her  
afterwards.

If the wife joins in fine she is barred, her joining is suffi-  
cient in all the States. In Eng<sup>d</sup> her going into court don't  
make any difference. Black 681. Plowden 575.

If she joins in conveying lands which were given in joint-  
ure after marriage, it don't bar her of dower at all, for  
she was not obliged to accept it.

### Of Coverture.

If a man marries a woman seized of an estate in fee or tail, and  
has by her issue born alive and capable of inheriting the estate  
he has a right to such estate during his life after his death.  
The issue must be in fact and not in law, for the husband  
can compel a reversion in fact, whereas the wife can't as to her  
dower lands. The issue must be born alive, yet not be heard  
to cry - other evidence is just as good. In case of dower there  
need be no birth of issue, provided that if issue were born, it  
would be capable of inheriting it. Coverture may be had as to

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the whole estate, but dower is only  $\frac{1}{3}$  part. Husband may be tenant by courtesy of a trust estate, tho the wife can have dower in it - No reason for this difference in point of principle.

3 P. W. 229. so of wife's mortgaged premises. 1 Attk 608.

This question might have been made in Convent: tho now too late. Our lands held under the charter of Charles 2<sup>d</sup> are held in Gavel-kind tenure and in Kent, the husband might have courtesy tho he had no issue. But in Convent by usage we have adopted the common law rule as to courtesy.

Living in adultery with another woman is no bar of courtesy, as to dower. So also in case he goes off with another woman is no bar, 3 P. W. 267.

But he has no right to courtesy or power over an estate when given to her sole and separate use. 1 Attk 607. 2 Attk 412. 1 Ves 278.

Incidents to an Estate for life.

All these estates for life whether by operation of law or otherwise i.e. conventional, are governed by the same general principles. Tenant for life is liable for waste i.e. he is liable to lose the thing wasted, & his estate therein goes to the reversioner with damages. If waste is committed only in part, he is liable pro tanto - If waste is committed & papin, the whole goes, because no distinction can be made.

If tenant for life attempts to create a



greater estate than he has, he forfeits his right, for it tends to injure the Lord. But in this country as there is no danger of injuring the title of the Lord, I think the reason don't apply.

Tenant for life has a right to estovers, firebote, haybote, and the like as much as is necessary for the purposes of husbandry. He has a right to timber to repair at times, it depends on contract however. If no agreement is made about it, it belongs to the Lord, and then he has a right to take timber for that purpose. He must apply the timber on the farm, he must not <sup>exchange</sup> sell or apply it for better to apply.

These estates are freehold and any estates less than for life, are less than freehold.

### Emblements.

Emblements are those things produced annually by labour, not that which is increased by labour, as grass and trees. Grain and the like are emblements. There are sometimes real and sometimes personal.

When a man conveys land having crops upon it, the crops pass with it as real property unless specially reserved, and this is to be done by deed, for if passed by will within the Stat of 28.2. Ignorance of this rule has caused frequent injustice. If land on which are emblements at the time of the devise is devised, they pass as real property to the devisee, for the devisee intended the land should go. If emblements are taken *enim ino puaudi*, tis only,

### Emblements.

perhaps and not theft. So if a man takes corn growing his trespass, but if he takes corn which is gathered his theft. In the former case he invades real property in the latter personal.

But if a man dies without having devised his property, the emblements go to his Executor and not to the heir for here they are personal property. The land has emblements at the time of the death of the decedent, but has none at the time of the devise made, the Executor takes the emblements for the intention is to be pursued.

If the same emblements are not on the land at the time of the death of the decedent as at the time of devise made, there is no accomplishment of the legacy.

If the tenant falls in and to his estate by his own acts he shall not have the emblements - secur if the reversioner terminates it.

If the act of God terminates his estate tenant shall have emblements for actus dei nemini facit injuriam. Besides his to encourage husbandry.

So if a woman hold an estate during her widowhood, if she marries she loses emblements. So if the lessee knows the exact time his lease expires and then sows a crop not matured till after that time, he loses the emblements.

If however the land is let to an under lessee, and then the first tenant determines the estate by his own act, the under lessee shall not lose the emblements, for he is not to blame.

I will now explain some maxims -

1.<sup>st</sup> The estate of freehold shall not be created to commence in future, i.e., it must vest eo instante of its creation or not at all.

A freehold proved by corporal tradition in presence of witnesses, and the evidence of title was reposed in their minds. Now as it would be difficult for them to remember how many months forward the estate was to commence, it was determined it should commence at once, or not at all.

By the maxim is meant not that the grantee must take the right of enjoyment immediately, but that the grantee must then part with his interest. A. may grant to B an estate for life or years and the remainder to C in fee. So the reversion is transferred to the remainderman in present, the right of enjoyment is postponed. But this maxim is sometimes dispensed with. In a devise an estate may be created to commence in future, yet not so as to create a perpetuity. It must be given to vest in the life of a person who is now living and in the meantime it descends to the heirs. It may also extend 21 years after the death of a person now in being, for it may be to A & his heirs who may be born at his death. May it may go 9 months further.

I think our Stat by implication destroys this maxim, it says all estates by deed or will given to any person in being, or any immediate descendants of him is good and no other is good. So it may be the youngest child in town, or his issue-



Maxims.

diate descendant, youngest, or eldest.

2<sup>nd</sup> Another maxim is, a freehold must not be in abeyance, i.e. the freehold must be vested somewhere in some body. Thus if A gives an estate for life to B the freehold is still in A. But if he limits over a remainder to C the freehold is in C.

Suppose an estate given to B for life, remainder over to B's eldest son, he having no son yet. This is a good contingent remainder for if he has a son it will vest.

But to support a contingent remainder the particular or prior estate must be a freehold, for as the freehold passes out of the Grantor, it must vest in the particular tenant, otherwise it would be in abeyance or looking out for some person in whom to vest, and this the law abhors, as the ancients did a vacuum.

So an estate to A for years, remainder to the son of B and over is bad.

3<sup>rd</sup> Another maxim was, a fee simple is not to be limited on or after a fee simple. As to A and his heirs and for the want thereof to B and his heirs, this is bad, for he gives the whole to A & his heirs, and so has nothing to limit over. This is now the rule in deeds. Vaughan 269. Co Litt 15.

But in wills this rule is dispensed with. So an estate may be limited to vest on a contingency, i.e. to happen in a life or lives in being. So to A and heirs and provided he die without heirs, in the life in the life of B, then to B and his heirs - this is good. This estate



is not alienable. Is it not a fee simple, but a new kind of estate created under wills. Co. f. 591. Baug. 270.

But what is meant by a man dying without issue? It means any indefinite failure of issue at any time. So if to A and heirs (and provided he die without issue to B in fee) now some say it means if his issue ever fail at any indefinite extent after his death. Now tis said this contingency is too remote, but this doctrine is absurd for according to this a man might be said to have died with issue, and then again to have died without issue.

So 800 years after his death he might be said to have died without issue. Courts accordingly when they can lay hold of any circumstances that show that dying without children was meant, they will do it to give effect to the devise. But if tis merely to A and his issue, it goes on indefinitely.

If an estate is given to A for life, remainder to his heirs this shall be a fee simple estate in A, the estate for life being void, the word "heirs" makes it a fee simple. Now it has been contended strongly that if any other words are used to express an estate for life, besides "estate for life" then he shall take an estate for life, others say that the word "heirs" always means a fee.

Ordinarily the word heirs is not a word of description, but expresses the quantity of estate given. Now 343. So if to A for life and on his death to B and his heirs, now if B die before A, B's heirs can't take. 1 Co. 93. 4 Bar. last case.

Estates less than Freehold.

In a will I don't see that giving an estate for life can mean any greater estate than that. 1666.

Estates for Years.

This is personal property, and goes to the Executor, and may be sold like any other personal property, however long the term, yet in Eng<sup>d</sup> tis personal property. In Con<sup>t</sup> long terms are considered as real estate. This estate must be created by an instrument in writing. This taken from the Stat of frauds &c which we have adopted. In Eng<sup>d</sup> a lease for three years is excepted. We allow such exceptions. Formerly by Com law a lease might be by parol. 2 Wils 26. 49.

It must be for a certain time, or by reference to something that will under it certain. It must have a certain beginning and a certain end, depending on no contingency, and such as may not happen for life - tis a life estate. If the contingency is of a different nature from this, the lease creates no estate at all.

If given as long as time shall last, tis a fee simple in a will. But such an expression in a deed could not create convey a fee.

An estate for 3 months is an estate for years, for it has a certain beginning and end. It may be created to commence in futuro, for no freehold is conveyed. The usual words are "lease and demise". No technical words necessary. So a covenant that he shall enjoy it is sufficient. Co Litt 45. Moor 161. Holt 35. Cro J. 92. Cro 820.

If the lease fixes no time for the commencement, the date of the execution of it is the time, or if delivery is afterwards made

that determines the date -

Tenant in fee can lease for any length of time. Tenant in tail can lease only for his own life. If he lease for 20 years, his death previous to that time would destroy the estate. So it may last for life, yet it is an estate for years, for there is a time beyond which it cannot last -

By a that in Eng<sup>d</sup> an estate for 3 lives or 21 years may be created by tenant in tail. Tenant for life may lease just as tenant in tail. Tenant for years may make a sub-lease, or assign his own, but he is in the same predicament et supra. Mow 417 or 432.

If a lease is made to A for 3 years and afterwards to B for a certain ~~time~~ term, now if A forfeits his estate before 3 years have elapsed B's estate commences immediately on the determination of A's.

A man may make a lease to commence on the day of his death. There has been some dispute when a lease commences, when said from the date, or the day of date.

A lease to commence from the day of the date will be considered as inclusive, or exclusive of the day of the date according as it will give effect or make void the instrument, or the intention of the testator.

A lease to commence from the date begins at the moment of the date. Now is freehold estate given to commence from the day of the date a good estate? If so said that is a freehold to commence in futuro. Lord Mansfield considers all the cases in Crop 714 or 114.



Estates for years.

Most clearly his good estate, for undoubtedly the person creating it intended it to commence from the time of making the deed. Indeed I think "from the day of the date" is exactly synonymous with "from the date".

The time of commencement may be past as well as present, or future, provided the time of ending be fixed. At lease may be good by reference to something certain, for *ille centum est, quod centum potest reddi*. So for as many years as C shall say is good provided C names it, it is reduced to certainty. Co 35. So for as many years as C leased for, or as long as the lease which he holds.

But a lease for as many years as C shall say, seems not to be within the Stat of 34, for the time don't appear in the instrument. 2 Burr 1023.

If C leases to B for one year and so on from year to year his good for 2 years. Moor 372.

But a lease for so many years as B shall live is void, as a lease for years. Co 35. So a lease till £100 is received is no lease at all so uncertain.

In the reception of a lease the estate commences immediately without any entry. So he may convey before entry. So he is bound to pay rent. This estate is called his interest. His tenant for years is liable for waste, and to forfeiture, and is entitled to distress to repair, unless covenant on part of lessor to do it.

Formerly it was held that a life estate could not be created



by tenant for years, because it was considered as greater than an estate for years. This is so now in deeds, but in devises the rule is otherwise, for tenant for years may devise a life estate, however the first idea was he could not create more than one life estate.

But the rule is now, he may create as many life estates as he pleases provided all the devisees are in being at the time.

A term of years can't be entailed, of course if a man does at length to entail it, the first donee takes all - so to it and heirs of his body.

Now tho' the policy of the law won't allow entailments, why may not he create something out of it, since a life estate might be limited after a life estate. Why not allow donee to take life estate, and then let his heir take the whole estate, no danger in this, and this would be giving effect to the intention of the testator as far as possible. That question *supra* is now agitated in England.

What is entailing an inheritance? When a man in making provision for his family by deed or will gives a lease to a younger child which is to cease on receiving a certain sum of money from the heir, then the estate descends to his heir who then takes by descent. This is entailing an inheritance. It is a method of raising a portion and providing for younger children.

If B wants to give an estate for life to A, remainder over to his son, now if this estate is surrendered up before a son is born, the contingent remainder is destroyed. But to prevent this effect,

### Estates for years.

trustees are appointed in the deed to preserve the contingent remainder, in whom it will vest immediately on A's estate ceasing and continue till A's death.

Foot and heirs of his body in strict settlement means to A and eldest son, and his issue, and on failure of these to next eldest son and issue and so on.

### Estates at will.

This is disolvable at pleasure of either party, no writing necessary, it is a licence. Co Litt 55. While the tenant holds the estate he is bound to pay rent. It may be terminated by express words of lease, or by his exercising acts of ownership which are inconsistent with tenants right. Co Litt 59. 1 Roll 860. 10 cent 24 p.

But the lease may not invade the emblements, as by reaping, this is trespass, tho it would determine the estate.

Lessee too may leave when he pleases, but must pay rent for the time which he staid. So if he commits waste he determines the estate, tho he is not liable in action of waste. 1 Roll 860. Co Litt 57

Co. L. 890. Either party may determine the estate, the consequence of this determination, either by the lessee exercising acts of ownership or by the lessor doing that which would be waste in others, places the lessee in such a situation, that he is ever afterwards a trespasser while he remains on the land.

When the estate is at an end he becomes a trespasser however he has his rights those of ingress, egress &c. He may have acquired a right to the emblements, and if so may have any one

who invades them.

The lessee may consider his flagging either as a disseisin or as a trespass, and may bring an action accordingly, of course he may have an action of ejectment if he pleases. By Stat. in Eng. and the U States, he may assemble a Court called a peaceable Court and turn him out if he retards, or forcibly enters. If a man forcibly enters on another's land he may use all necessary force to drive him off, and if he gets killed 'tis his own fault. - Walt. 413, 14.

If all goes peacefully he is bound to pay rent according to contract, and if the lessee determines the estate, he is not excused from rent, but if the lessee determines it before the year is ended he loses it because 'tis his own fault, and no apportionment of the rent can be made. If the lessee cuts timber trees 'tis not waste but trespass. No man can be a trespasser who has possession till that possession is determined. Co. Litt. 57.

A lessee for years by parcel is tenant at will, he is no trespasser, his lease is only a licence, and 'tis good evidence.

There has been a great question made in Eng. respecting reserved rent, when he could recover quantum meruit. By late decisions this question is at an end, and the lessee may shew his licence to enter and his lease is used to shew quantum meruit.

This is presumptive evidence and the best to be obtained, but it may be rebutted.

Estates at sufferance.

Differ nothing from those at will,



Estates at sufferance. Four observations.  
only that one is an implied, and the other an express presumption.  
an estate at sufferance is when one comes into possession by lawful  
title and holds over after his title is expired, he is bound to pay  
rent according to contract. I will now make some observations  
on four things omitted in their proper place.

I have said that a freehold could not be in abeyance. Thus  
an estate is given to A for life remainder to B's heirs. here the  
freehold vests in A and the fee in B's heirs.

"Quant in tail after possibility of issue extinct" is where one is  
tenant in special tail and the person from whose body the issue  
is to spring dies without issue, or having issue that becomes ex-  
tinct—this is an estate for life subject to all the incidents of  
a life estate, except he is not liable for waste, and the thing  
wasted or cut goes to the reversioner. Co Litt 2y 2 B 125.

One thing respecting dower. By Stat if she commits waste she is  
liable to lose it, no provision is made for actual waste only for  
damages. She may cut timber, plow by wage and practice in husbandry.  
She is not sued in an action of waste but is liable to the heir in  
an action of trespass to recover damages. He don't recover  
the thing wasted.

As to permissive waste, our law don't suffer an action of  
waste to be brought to recover the thing wasted.

If the tenant in dower don't repair, the heir may go and re-  
pair and then take possession to reward himself. He usually



takes some part of the farm. He must only make such repairs as are necessary, and this she must determine by an action in dispute about it. All this is done by Stat. and I am told by farmers that tis a very beneficial law both to the heir and widow.

Now consider the term "months" in contracts and leases.

By months is meant at Com law lunar months - in mercantile law solar months. This is settled law. If a man hires for a month it means four weeks. The original idea on this subject was I believe that it meant 26 working days. C. C. 61

In Eng<sup>d</sup> terms for years are personal property, and the length don't alter it. In Connet we treat them as fee simple - have endowed - made the husband tenant by the curtesy - sustained a conveyance, and we have admitted the tenant for years for a juryman. In Eng<sup>d</sup> these can't endow the wife because personal property. They don't consider the reversion any thing. Our mode of treating this estate is a matter of great convenience.

These species of estates may be conditional, and may be liable to be defeated by that provision. Co Litt 215.

<sup>These conditions may be precedent or subsequent -</sup>  
An estate given to B for life with remainder over to C if he marries - this is a contingent remainder and if C marries it vests.

An estate in fee may be created and yet be under some incumbrance. All the lands in Pennsylvania held under Penn, and most in New York are held so. Thus a man may create a fee and reserve an annual rent to himself and heirs, but the owner of it,

Estates upon condition.

i.e. fee, may sell it when and as he thinks proper, yet it goes under this incumbrance and this quit rent must be paid.

It sells to B and his heirs forever reserving £20 annual rent, and provided it not punctually paid, I shall have a right to re-enter. This provision must be made in the deed. This conveyance may be made, and if the condition is not observed may be defeated. or if he chooses to pay a certain stipulated sum he shall be leased the quit rent.

Estates upon condition.

We will now consider the difference between a condition annexed to an estate and a limitation of the estate. When an express estate is so confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail - this is denominated a limitation as when land is granted to a man so long as he is Parson of Dale, or while he remains unmarried. In such case the estate determines as soon as the contingency happens viz when he ceases to be Parson &c and the next subsequent estate which depends upon such determination becomes immediately vested without any act to be done by him who is next in expectancy.

But when a condition between the grantor and grantee is annexed to an estate, and that condition is broken, the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage



### Estates upon condition.

of the breach of the condition and make either an entry or claim, in order to avoid the estate. yet the strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person and does not immediately revert to the grantor or his representatives - this the law continues to be a limitation and not a condition.

This is an universal rule that if the terms used are such as denote time tis a limitation, but if the terms used do not denote time tis a condition. A grants to B and his heirs an estate while he continues unmarried tis a limitation. But if I would a grant by A to B and heirs forever so that B continues unmarried. Now what is the difference none in sense. But what is it in law? Why in one case he is a tuppaper for staying and in the other not. A grants to B an estate so long as he continues Baron of dale, this is a limitation by reason of the words "so long" denoting time; but if I give an estate to B to be defeated on his paying £10 tis a condition and if he dont pay it, it continues.

In case of a limitation the estate terminates upon the happening of a contingency, but in case of condition it continues, if Grantor or his representative dont take advantage of the breach of the condition to enter or claim, and so avoid the estate. Suppose an estate granted by A to B on condition that within years



A in feoffment with C, and on failure thereof then to D and his heirs. This the law construes to be a limitation and not a condition because if it were a condition then upon the breach thereof, only C or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter. But when it is a limitation the estate of B determines and that of D commences, and he may enter upon the lands, the instant that the forfeiture happens. 10 Co 41. Went. 202. Cro E 205. 1 Roll 410. 2 Litt 442.

Then express conditions annexed may be of such a nature as to be of themselves void without reference to any thing else, still the grant itself may be good. Thus if the conditions at the time of their creation are impossible to be performed and afterwards become impossible by the act of God the grant being made, it vests, the grantee not being to blame. Or if the grantor himself defeats it by his own act or if the condition is to be defeated if the grantee do an unlawfull act, it vests in order to remove the temptation, or if the condition is repugnant to the nature of the estate the conditions are void. 6 Litt 266.

In any of which cases if they be conditions subsequent i.e. to be performed after the estate is vested, the estate shall become absolute in the tenant. But if the condition be precedent as a grant to a man that if he kills another he shall have an

Conditional estates.

estate in fee, here the void condition being precedent, the estate which depends thereon is also void and the Grantor shall take nothing by the grant, for he has no estate until the condition be performed.

4. Water in Lycopodium, ferns and mosses

This subject depends on a few





Of Estates in possession, remainder, and reversion.

This subject depends on a few general rules or principles. They  
 first then will be to give an elementary treatise upon it.

In the view now to be taken, regard will be had not to the quantity  
 of interest in the owner but to the time of enjoyment.

Estates under this view of the subject are of two kinds - in possession  
 or in expectancy.

Expectancies are divided into two sorts - 1 remainders created by  
 act of the parties & 2 <sup>2d</sup> Reversions created by operation of law.  
 2 BL 163.

Estates in possession is estates executed hardly need a defini-  
 tion. Estate in the books means an estate in possession of course  
 unless the contrary appears.

1. An estate in possession is a present interest not depending on  
 any subsequent contingency, and accompanied with a right  
 of present enjoyment. Blackstones definition is imperfect. He  
 says it is one by which a present interest resides in the owner, not  
 depending on a subsequent contingency. This applies also to a  
 reversion. But the right of enjoyment is deferred and this is the  
 ground of the distinction. 2 BL 163. See dec. 239, Term 1

The rules given by Judge Reeve all apply to estates in possession.

Of Estates in Remainder.

This is an estate limited to take effect and be enjoyed after an-  
 other estate in the same subject matter is determined, as the

## Real Property.

same land. E.g. An estate granted to A. tenant in fee for years and after the determination of the term to B and heirs, this is an estate in Remainder, it is called particular tenant and B is remainder man.

The estate that precedes the remainder is called the particular estate and the estate that follows it the remainder. Co Litt 143.

2 BL 164. These two interests are one estate i.e. they compose only one estate in fee, they are each of them component parts of the estate in fee, which embraces the whole estate, that can be had, is enjoyed in any real property, or subject. All these then constitute but one whole according to the mathematical principle, "that all the parts are equal to the whole" 2 BL 164. 2 Wood 130.

It follows that no remainder can be limited on, or after a fee simple, for the fee exhausts the whole interest so that there can be no residuary interest. The fee is supposed never to determine, tho the owner may die without heirs, 2 BL 164. Plow 29. bough 269.

It may occur that a fee or remainder may be limited over after a fee by executory devise. This is not however true, for then one fee is substituted for another in a certain event, tis not additional to an entire fee simple, for this is physically impossible. The most proper word to create a remainder is "remainder" tis the appropriate word, others however may be used. Powd. 242. Plow 134. 159. 170. Thus far of the general nature of remainders.

Of Particular Rules on this Subject.

## Real Property

1. To create a remainder there must be some particular estate<sup>particular</sup> to that in remainder, the preceding estate is called<sup>the</sup> "particular estate".  
 E.g. To A for life, remainder to B in fee. Remainder is a relative term and implies that some other particular estate exists, or that some part of the thing is previously disposed of. Co Litt 49, Mors 34. 25.  
Laro. Sec 242. 2 B. & W. 165.

An estate then created to commence in futuro without a particular estate is not a remainder, not a residuary part. Particular estate and remainder are correlative terms. One can't exist without the other. 2 Bl 165.

A freehold interest cannot at common law be created to commence in futuro. It must take effect immediately in possession or in remainder. Reason is living of seisin is necessary to create this estate. 2 Bl 165.  
5 Co 4. Ray 451. Exception in the case of freehold rent: Wain 424.

The object of the last rule is to prevent the freehold from being in abeyance which would fetter <sup>alienation of freehold brings fees in due to perform service to the lord.</sup> future inheritances, and would prevent the tenant to the Prince from recovering his right in a real action - so no real action could be brought, for he might create it to commence 999 years hence, as well as one moment. Wain 294.

If this were the case the ultimate property would be of little use or value, could not be sold and thus would inheritances be fettered i.e. sale would be fettered. But the principle reason is the other one.

E.g. A lease made for 150 years not having a right - how the title could not be tried by a real action. Now, however real actions



### Real Property

one out of use in Westminster Hall almost as much as in Court St.  
2 will 166. 2 wood 200.

Living of reversion I observed was necessary to create a freehold and in its nature operates immediately or not at all, that imports a present intent i.e. the precise act of giving a present possession of a freehold, and is an insuperable objection to commencing an estate in futuro simpliciter a contradiction.

Suppose then a particular estate created, here livery of seisin or present possession is to be made to particular tenant, and that operates to give effect to B's remainder. So if the estate in remainder commences in present, tho' to be enjoyed at a future time.

2 Bl 166. 7. 8

At least at will is so precarious an interest as not to be sufficient to support a remainder. Is not regarded as a part of the inheritance - this is the true reason. Blackstone adds in case of a freehold remainder, entry to make livery will destroy an estate at will. I think it otherwise for the particular estate is created at the same time. Indeed that is not the reason appears from the circumstance that an estate at will will not support or maintain, this don't amount to a freehold Ray 51. 867. 2ger 13.

As there must be a particular estate to support a remainder, it follows that if the particular estate is void at its creation, there can be no remainder, for there is no particular estate. E.g. an estate for life not in fee, remainder to B in fee, here is no remainder.

Co Litt 293. 2 Roll 415. Jones 58. 2 B.C. 167.

And if the particular estate the good in its creation is defeated before the remainder can vest, the remainder must fail. Blackstone gives the rule wrong, he says it defeats the remainder, if it ever fails. I say it does not if it may vest when the other is determined. Eg. Estate to A for ten years, and after the expiration of ten years, remainder to B. Now A forfeits his estate at the end of five years, this defeats the remainder, because it can't vest then. But if limited to A for ten years and after the expiration of that estate to B for life, here the destruction of A's estate in two days only accelerates B's estate, for in these cases the expiration of it by forfeiture, surrender, or the like comes to the benefit of the remainderman. To be sure there must be no chances. This rule does apply in cases of contingent remainders. 2 Bl. 167. but not to vested remainders, they being raised at the creation of the estate.

2 Woodd. 180. b. 4. Pearson conting. rem. and. 209. 234. 241. &c. 261. 2 Bl. 155. b. 167. This is the remainder depends on the living of person made to the particular tenant, if this is defeated by grantors entry for condition broken, the remainder fails. 2 Woodd. 180. &c. 2 Bl. 167. See also in 2 Bl. 155. b. and quote can that be called a vested remainder. 2 Bl. 167.

2<sup>d</sup> General rule is that the remainder must vest or pass out of grantor at the time of <sup>creating</sup> the particular estate. This needs explanation. The absolute or contingent right must then pass out of

Real Property.

the Grantor.

Suppose an estate to A for life remainder to B in fee absolutely, here the rule applies, B's remainder passes by the living of B since made to A, But suppose estate to A for life and remainder to B in fee on a certain contingency. Here I think the contingent right to enjoy the estate (unless it happens when it passes in-lieu from A) don't go to the remainder man, for if so his is a vested interest. So the rule applies only to vested remainders. 2 Bb 167.  
Lit text top. Plow 25. 2 Wood 177. Pender. 242. B.

That interest don't pass to contingent remainder man is certain, for tis settled that the interest limited continues in the grantor, till the contingency happens & it will descend to his heirs. The contingency would be in dubio i.e. no where. Caith 262. Term 275.  
285. b. 267.

A remainder can't be limited on an estate already in effect, created before hand. <sup>Particular estate of remainder must be created at same time.</sup> To be sure the interest remaining may be granted as a reversion and not as a remainder. If he should call it a remainder still it would be a reversion. Indeed it seems there must both be created by the same instrument.  
Term 228.

3 Rule is, the remainder must vest in the Grantor either during the continuance of the particular estate or <sup>if by determination</sup> "at instant". It must vest in interest and not in possession. If it is vested in interest tis sufficient. Suppose an estate to A for life, remainder to B in fee B



being alive, remainder vests at the creation of the particular estate, not in possession, but in interest.

So to A for life, remainder to B provided he returns from over sea in 5 years, he returns within the time and at the moment he returns the interest vests and is good within the rule.

So to A and B during their joint lives, remainder to the survivor here the remainder vests so instantly, that one's life determines.

Indeed it vests also in possession tho that is not necessary. It never can vest in possession during the continuance of the particular estate.

It follows that if it does not vest (as supra) the remainder must fail. Eg. Estate to A for life, remainder to the eldest son of B unborn. A dies before B has a son born, here the remainder fails, for the estate can't be enjoyed in continuity and from the nature of there being but one estate, both must be in op<sup>e</sup> together, and one is said to support the other. *Howe v. Ward* 243. 166. 188. 210. 186.

Indeed it may be void at its creation, thus to A for life remainder to B to take effect after A's death, is void in its creation.

2 Bb 168. Plow 25. 3 Co 21. vesting an interest vide *Pearce* 233 &c 237. 240.1.

Remainders are of two kinds - vested and contingent.

By vested remainder is meant one vested in interest, for after it vests in possession it's no longer a remainder tho converted from an estate in expectancy to one in possession. A remainder as is implied ex vi termini imports expectancy.

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A vested remainder is one by which a present interest passes to the grantee to be enjoyed in futuro, i.e. to take effect in possession at a future time. A vested remainder is one which carries with it a present, fixed right of future enjoyment. Fearn 1. Sec D 345. 2 B & C 165. 2 Wood 175. As to A for years, remainder to B in fee, here the estate is vested in interest.

A contingent remainder, or executory remainder as it is sometimes called is one by which no present interest passes to the grantee, but is to take effect upon a contingent or uncertain event, as the birth of a person. This is an uncertain event notwithstanding what Blackstone says who calls it limitation to an uncertain person. Eg. to A for life and remainder to B provided he return from beyond sea before A's death, here at the moment of his return the remainder becomes vested.

Again to A for life remainder to the eldest unborn son of A, this is contingent, but on the birth of a son during the life of A, the remainder vests an interest. Here a possibility clothed with an interest is descendible. The right to enjoy the property is possible. 3 Salk 228. 3 Co 20. 2 Bl. C. 169. 2 Wood 171. 2. 4. Pow D 250.

1 Bro & P 215. 4 mod 282. Fearn 2. B. 4.

Suppose an estate to A for life, remainder to B in fee. This is vested. But if to B after the death of A, this is contingent, for A may perfect it. But to B after the determination of A's estate, is vested. <sup>contingent if A dies before B is born</sup> Dong 251. Remainder to person unborn is contingent;

At com law if the remainder were limited to the eldest <sup>son</sup> of the particular tenant, his son an infant in ventre sa mere at the time of the determination of the particular estate, could not take. Not in ope. Indeed at com law he was deemed to be in ope for very few purposes only. See by that 104 11 w. 3. for by those the remainder went in a post-humous child while in ventre. 2 M 169. 2 Wood 200. Salke 228. 2 Co 51. 4 Bond 282.

The a remainder may be limited to one not in ope, yet it must be limited to one who by common possibility may be in ope at, or before the time when the particular estate determines.

Common possibility is contradistinguished from remote possibility. E.g. an estate to A for life, remainder to the heir of B. B being in ope is good, for his heirship B may die first and so have an heir, to be sure no one has an heir while he lives, for heres est heres parentis. The law presumes every one will have an heir, so there are not the uncertainties in contemplation of law in such a case. Henan 175. 2 Co 51. Goddard 264. 378. 2 B 3 169. 70.

But remainder to eldest unborn son of B. he being unborn at the time, is void in its creation, to a possibility on a possibility, for here to express that B should be born, and then should die during the continuance of the particular estate.

So too the eldest unborn son of the unborn son of B is void. Goddard 25. 184. 2 Co 4 33. 2 B 6 75.

So too to an unborn person by a particular name is void in its creation. Thus to John, the eldest unborn son of A is bad.



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for there is too remote a possibility, for a son is first to be born, and then called John. Beam 177. 2 Co 51.

On the same principle a remainder limited on the happening of something unlawful is void, for is a remote <sup>and impossible</sup> possibility in legal contemplation. L. J. Remainder to an unborn illegitimate child is void. 2 Bl 170. beam 175. b. no 6509. Plow 32. I consider this as grounded on policy. Is impolitic to encourage an unlawful act. The rule itself is arbitrary. A limitation in failure of a preceding limitation is not of course contingent. 1 Bos & C 250.

Is a rule that a contingent remainder of freehold cannot be limited on any estate less than a freehold. The freehold can't be in abeyance. I think the whole freehold don't pass out of the grantor. A freehold not the freehold must pass. Reason is there must be a vested freehold somewhere so that there may be a tenant to the Precipe. It must then vest in the particular tenant, not remainder man, for he is not in existence or the event has not happened. Since then it passes out of the Grantor and by the supposition it can't vest in the remainder man it must vest somewhere it does in particular tenant. 2 Bl 171. 1 Co 133.

Ray 151. 2 Wood. 199.

Devise to A and B for their lives, and the life of the survivor. But if B marries and has issue, then after his death to B, and her heirs, and if B dies single without issue to A and her heirs, A and B take a joint estate for life, with contingent remainder in fees to each in the alternative. Doug 425.

A contingent remainder may be defeated by the determination of the particular estate before the contingency happens, agreeably to the 3<sup>rd</sup> rule Ex- death, a limitation, surrender &c. *E.g.* The particular tenant forfeits his estate while the remainder man is yet unborn. <sup>364</sup>  
 2 B.C. 177. *Heam* 241. 245. 262. 252. 4. 8. 270. 2. 2 Dec 39. 1666. 185.

But the determination of the mere actual reversion of the particular tenant does not of course defeat the contingent remainder, for the particular tenant should in fact be dispossessed, he has a right to enter and his estate continues and so the remainder is supported.  
 2 Wood 196. 199. 12 Wood 174. *De Key* 316. *Skinn* 559.

To prevent the destruction of the remainder in such cases the practice of appointing trustees to preserve contingent remainders has been adopted. This arose in the time of the civil war in England to prevent the destruction of remainders by forfeitures for treason. *E.g.* to A for life, remainder to B during the life of A, remainder to C an unborn child. Now if A is forfeited by A. B having a vested remainder takes the estate till the death of A, or as the case may be till the birth of a child. This depends on the limitation 2 B.C. 177.  
 2 Co Litt 378. 5 Co 51. *Heam* 84. 7. 8. 95. 120. 1. 3. 152. 7.

*Heam* is the ablest writer on the Eng<sup>l</sup> law on any subject.  
*Holt*. 33. 5 Co 51. 100. 142. 2 Co Litt 246. 5 Co 547.

The question whether a remainder is vested or contingent does not of course depend on the probability or improbability of its ever commencing in possession, but on the limitation *E.g.* to A & heirs

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of his body, Remainder to B. This is a vested remainder and yet it is not probable it will ever take effect. - It is the uncertainty whether the remainder will ever vest in interest, not whether it will ever take effect in possession that renders it contingent. But the nature of the limitation determines it, and not the probability &c. If the limitation is contingent, then the remainder is contingent, *secus* not.

Again to A for life, remainder to B, is vested, and yet it may be forfeited and so the remainder be destroyed. But if to A for life remainder to B, if he survives A, is contingent, and yet the probability of enjoyment is as great here as in the other case.

2 Wood 191. 2. 184. 192. Holt 98. Holt 232. 3 TR 488. 2 D Ray 252. 3. 4. 3 TR 488. 9.

To determine whether a remainder is vested or contingent this is the universal criterion by which to describe its nature. viz. If it has a present capacity of taking effect in possession, if it were now to become vacant it is vested, but if remainder has not this present capacity of taking effect in possession, it is always contingent. *Pearn 149.* To A for life, remainder to B if he returns from beyond sea in 5 years, look if A die now, he can't take for he has not returned. But after his return he can take at any time. so it is vested. So if limited to the unborn son of B, till the child is born it is contingent, for if the particular estate should determine first, the remainder would fail. *secus* after the child is born. *Pearn 149.* If an estate is limited to two persons, remainder



in one event to one, and in another event to another. These latter limitations are called corp remainders. E.g. Estate to A and B as tenants in common, remainder to survivor. Hot 33.4.

4 Bac 392, Cow 31, Dyer 308.

Said that corp remainders can't arise between more than two, for otherwise there would be complement. This is not true and whether corp remainders or not-corp remainders is a question of construction, and when it's raised by implication, the presumption favours the construction if between more than two, and the complexity is the reason of the last distinction. This is the amount of the rule. Cowp. 780. 31. 797. 2 East 40. 36. 416. 1 do 229. (a) (155)

But where corp remainders are expressly limited they are good, however numerous the remainder men E.g. to A and B and after the death of both without heirs of their body to C, here is plainly an implication that as long as there are any heirs of the body of either of them, this shall have an estate tail. Cow 31. 780. 791. 1 East 229. 2 do 410. 466.

Said again that corp remainders can't be created by deed, this is not true. Co Litt 25. 4 Bac 393.

The true rule is this, they can't be created by implication in a deed, but may be in a devise, but not in a deed. E.g. as to A for life, and after his death without heirs of his body to B. 1 East 416.

Seems to be the prevailing opinion that in Connect a fee hold estate may be created to commence in futuro, in a deed as well



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as a will provided it is to a person in being at the immediate issue of a person in being at the time of making the deed. This is implied in one of our Stat's which says such estate shall not be given unless to a person in being &c. I however think it questionable. Stat 24.

### Ex. Executory Devise.

This is a species of reversion and is very much like a contingent remainder, the differing in the mode of its creation.

Blackstone defines an executory devise to be a devise of a future interest, not to take effect on the death of the testator but on some future contingency. This includes a contingent remainder created by devise, so the definition is imperfect, for the it gives the general nature, it does not as logicians say, give the specific difference. Feam 298. 2 Bl 172.  
1 Eq. ca. ab. 186.

A better definition is, an executory devise, or bequest is such a limitation of future interest by devise as the law admits in a devise, but not in con law conveyances. It follows that any limitation <sup>made in devise which is not to take effect at a death</sup> - It follows that any limitation, it can ensure as a remainder, can't be an executory devise. So a contingent remainder may be created by devise, and is good and yet is not an executory devise. Feam 178. 9. 295. 362. 2 Wood 222.  
2 Wood 222. 33 R 487. 768. 2 Vesey 611. 2 Vaud 353. 3 Ck 998. Earth 844.

Low 294. Doug 729. 4 Mod 258.

Executory devises are allowed out of mere indulgence to men's last wills, and testaments when otherwise they would be void.

The indulgence in almost all cases extends to the construction, but here it extends to the limitation reason is will are made by men without council inops consilii in extremis. So it would be hard to apply the common law rules of construction to devises. They were introduced by Stat Hen. 8. 2 R. 172. Mod. 250. Fearn 299. 2 Wood 291.

Executory devises originated in the reign of Ediz. and have been regularly built up since that reign till they have become a confluence. 3 R. 93.5.

It differs from a remainder in three essential particulars. 1. An Executory devise tho a freehold to take effect in future needs no particular estate to support it even in case of a freehold cum with a remainder. 2. Any way of executory devise, a fee simple or other estate or pore contingency may be limited on or after a fee simple.

3. That by it a reversion may be limited of a chattel interest after a life estate in it. 2 R. 179. 398. Fearn 303.4. Talk 229. See 6578.

Salm. 132. 10 Wood 420. 294 74. Talk 610. See 6346.

Such limitations as mentioned supra, in our law conveyance are void (allowed only in test wills and testaments. So a freehold could not be given to commence in future, and a fee exhausted all the

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interest a man had in the subject, and again a life estate is greater than any chattel, and so exhausted the whole term for years.  
Heam 305. 6. Pow 2238. 250.

A contingent limitation may be so made by devise, that tho' in its creation a good remainder, yet it may in a certain event become an executory devise. Thus if a contingent limitation is made by devise to depend on a preceding freehold capable of supporting it as a remainder and the preceding freehold fails before the testator's death, as by the death of the first devise, the second limitation shall then operate, or come in as an executory devise, and yet it was a good contingent remainder in its commencement.

Heam 401. 418. 9. Salt 44. Off. Estate to A for life, remainder to the unborn son of B, if he dies before the testator dies, now this limitation fails and never takes effect, and so becomes void before the death of the testator, for the devise is not consummated till testator's death. Well now the courts will so construe it as to not make it a gift given perpet and will allow it to come in as an executory devise. For he knew before his death that the particular estate had determined. So he must be supposed to intend it as an Executory devise. And reason is if the first devise survives the testator, the estate commences and after it has begun to operate one way, you can't change the nature of it. Heam 401. 418. 19. Salt 44.  
To explain the rules in executory devise.



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1. An executory devise even of freehold needs no particular estate to support it. 1<sup>st</sup> a limitation by devise of lands or any other estate to A and his heirs, to commence on the day of his marriage is good. It is a freehold to commence in future without a particular estate to support it.

Again a devise in fee to the heirs of A when he shall have one is good by way of executory devise yet non est heres vivente, yet both of these would be void in a deed, for it is a limitation of freehold to commence in future, without a particular estate to support it. 2 Bl 173. Seam 203. 4. 2 New 233. Dow D 255. 8c. Cro 8378. 1 Sid 153. Croj 593. Ld 226. 229. Pakin 132. 1 Eq. ca ab. 189.

And in the mean time till the contingency happens the interest and possession i.e. the fee descends to the heirs at law of the testator E.g. to the unborn son of A when he attains 21 years. Now till that time the heir holds the estate without account but his inheritance is suspended. 2 Wood 233. 1 P & M 505. Doug 481. note.

2<sup>dly</sup> a fee or other estate may be limited on contingency after a fee, E.g. to A and his heirs, and if he die before 21 then to B and his heirs - this is good by way of executory devise. Again to A and his heirs, provided that if B pay £500 to A by such a time then to B and his heirs - This is good. In this case the second fee is not to take effect after the first estate expires, for a fee exhausts all the interest that can be had in any subject.



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Here indeed the last limitation is not to take effect after the expiration of the first fee. It is then a mere substitute for the first fee in a certain event. This is not a remainder, for then a particular estate is carved out of an estate, and ~~the~~ <sup>the</sup> and the remainder constitute one estate. So this 2 interest cannot be barred by fine or <sup>common</sup> recovery, ut infra. 10 wood 120, Feam 416.

As to the same as this, I devise my estate in fee to A, if he does this and this, and if not then to B and his heirs. Feam 308. 416.

2 Bl 178. 398. 2 wood 181. 6. 226. 2 Rag 208. 189. ex. ab 36. 2 wood 289. 4 Bl 229.

Polson 132.

3<sup>rd</sup>. A remainder may be limited of a chattel interest after an estate for life. E.g. J. having a term for years devises it to A for life, remainder to B for years. This is good in a devise.

It could not be by deed, for in Com. law conveyance giving the life estate (which is higher than the term of years) amounts to a total disposition of the estate. 5 Co 95. 2 Bl 174. 2 wood 398. 9.

It ad this may be limited to any number of persons successively for life, and yet give the ultimate interest over, and they all take in proper succession, if all intervening ones are dead then the last takes next to the first. 2 Bl 174. There was formerly a distinction between a bequest and chattel to use for life, and a limitation over, and a bequest of the thing itself for life and limitation over. So in the former the limitation i.e. the remainder was good and in

the last it was bad. There is now no difference, both are good.

Mann 304. 8 Co 95. 10 Co 46. 1 R. 7. 11. 1. 2 Bl 398. Co 8 346.

Thus far is the distinction in the mode of creation of executory devise and contingent remainders rather than to the different natures of the estates when created. Fearn 306.

There is an essential difference in their natures also viz executory devise can't be barred by fine or common recovery, because if contingent remainder.

One reason is executory devise is not a present interest, so as with contingent remainder.

But the principle reason is, it don't depend on any precise limitation or particular estate for it descends to the heir in the mean time, & don't what if he suffers a recovery, this don't affect the devise, for his estate is not a subsidiary part of the same estate with that of the heir. 2 B. 617. Fearn 306. 8 Co 10652. Co 6 185. 2yer 71. 358. 2 Wood 227. 2 B. 593.

As an executory devise can't be <sup>quitted</sup> by a recovery, a time is fixed within which the contingency on which the ultimate limitation depends must appear in order to render the limitation good, for otherwise men could create perpetuities. This is against the policy of the law, so as with contingent remainders for they may be barred. So the contingency may be ever so remote.

A perpetuity is an estate unalienable. Fearn 314. 5. 2 Bl 1734. 12 Wood 287. Salk 229. 2 Wood 230. 1.

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The rule as to the time of limitation is this, An executory devise to be good must be so limited as to take effect, at all, within a life or lives in being and 21 years, and the fraction of a year, as 9 or 10 months afterwards. E.g. an estate in fee. to the unborn son of A when he attains 21 years of age. This is good for it extends only, to the life of the Father and 21 years of and a fraction, which is intended to provide for a posthumous child. Palsb 228. 236. 174. Doug 590. Heam 314. 320. 356. 798 595. 100

The example above is one of a life in being - it may happen during a life in being &c for here is no danger of perpetuity. Thus to the unborn son of A and so A and if he has none to the unborn son of B, and so on through the alphabet, but you can't limit it after the life of a person not in being.

So you may vary the limitation. Thus to A and heirs with condition, that on a certain event it go to the unborn son of B when at the age of 21 years. But the limitation to the unborn son of a person unborn is bad, for it exceeds the rule.

Observe if according to the terms of the limitation the contingency may by possibility happen at a more remote period than that prescribed in the instrument, it is void in the creation. E.g. Devise to the first unborn of, & the unborn son of A is void, yet it may be within 21 years after the death of A yet it may be otherwise. Heam 200. 314, 320. 355. b. 116 207 236. 174. Blackstone and others lay down this rule differently.



as to remainder of chattel interest viz. that all the remainder must be in use during the life of the first devisee and that the contingency must happen during his life. But this is not law. For this remainder to A for life, remainder to B for life, and remainder to the unborn sons of A would be bad as to the unborn son of A for the contingency here might not happen during the life of A, and of course the son might not take the ultimate interest. For the old rule vide 1 Sid 451. 2 R 174.

Minor 341. But it is settled that the rules of limitation are the same in all the 3 kinds of executory devises. 7 R 102.

Man. 320. 355-6. 30th 282. 2 P. Wms 421. 2 W & W 230. 2 Bro C. 490.

4 Bos & Puller 357. 395. 1 Com 284. 357. 304.

It follows as a general rule that if an executory devise is limited to take effect after a general failure of issue this too remote and so void, for it may take effect at a time exceeding that in the rule. E.g. To take effect after A dies without issue, as to heirs, and if he die without heirs to B. But how is the contingency too remote? I answer, as the case may be this contingency may happen at a time after the life or lives in being and 21 years afterwards, and a fraction of a year. For these words import his heirs ever failing which may be 1000 years after his death.

The remoteness of the contingency depends on the construction of the words "if he die without heirs" because the words import a failure of issue at any future period. So the giving heirs an



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estate tail by implication, and remainder in fee after the lineal descendants become extinct. To be sure his dying must be within the time prescribed. But he may die without heirs 1000 years after his death. Feam 315. 322. 341. 35c. Powd 426. Roll 268.

<sup>1</sup> Barr 877. 3 Co 111. 30th 617. 4 mod 316. 2 Ray 237. 2 Wood 232. 3. 241. 1 Eq ca at 186.

and this rule holds as to all the three species of executory devises. Feam 322. 341. 1 Vent 79. 39 R 146. 1 Roll 611.

You will remark, remainder in point of time is unimportant in contingent remainders, for there is no danger of perpetuity, because it is alienable.

But remoteness of time is the objection in Executory devises for otherwise there would be a perpetuity. Observe this difference. Limitations to A and his heirs, and if he die without heirs then to B and heirs. This is not an estate tail by implication but it is a fee after a fee, and this is good.

But if to A and heirs, and if he die without heirs of his body, to B - This is an estate tail by implication and B may take under the limitation as a remainder over. This is bad by way of executory devise. Feam 301. 170. 39 R 145. b. 7 & 246. Cow 234. Powd 426. 1 P. W. 123.

If however in case of such limitation over and of failure of heirs of body, as if given to A and if he die without heirs to B. If here these words viz. "if he die &c" are qualified & contained

by other words shewing these words to be used in their ordinary sense, meaning at his death, it is a good executory devise, because his dying without issue is confined to the life of a person in being. But when his not an estate tail by implication, courts will construe it in almost any manner to take it out of that technical construction. As if he say, if he die without <sup>his</sup> heirs then to B, this takes it out of that rule. So if he die without <sup>living</sup> issue at his death, is good as an executory devise. So living no issue behind him &c. Fearn 352. 3oth 225. 16th 207. Powd 251. 39B 146. 7th 322. 3oth 282. 2d 314. 308. 376. 18th 432.

3d 258. If one devise to A for life, remainder to B in fee, provided that if A's wife has a son born, the land shall go to him in fee, the birth of a son (not a posthumous) defeats B's estate, not A's, nor the particular estate. Powd 251. 2d 127.<sup>a</sup>

The Court decided that by Supreme Court of Errors that the words to A and heirs, and if he die without issue &c are to be construed according to their ordinary acceptance, and not according to their technical meaning. A limitation may <sup>also</sup> be good here as in executory devise (saunt) Mr Gould thinks it best to adhere to the English rules, for you must otherwise overturn much of the English law. You can't give both constructions. This might in that case operate as a remainder.

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is doubted that an executory devise shall take effect as such if it can take effect by way of remainder. Any limitation of a future interest estate as by way of remainder tending to create a perpetuity is void, whether in a deed or devise, I have said of this construction which we have adopted words allow of perpetuity by means of executory devise; of course no remainder which would create a perpetuity is good.

E.g. to A for life, remainder to his unborn son, is good but to the unborn son of his unborn son, remainder to his unborn son &c. is bad for so the ultimate fee is always in abeyance. So the rule is thus positively established viz. that no limitation can be carried further than the unborn children of a person or persons in fee. Heath 291. 2. 23 R 254. 4. 3. Burr 1632.

10 R 1032. 5. 20 R 6592

In some such cases however Courts of Justice to effect the general intent in devises will construe the limitation according to the doctrine of cy pres, as near as may be i.e. will give an estate tail to the first unborn devisee rather than the estate should fail. 23 R 248. 254.

When a contingent or other estate is devised over on a condition annexed to the preceding estate, and the preceding estate never takes effect, the subsequent estate of limitation takes its place, i.e. the remainder will be accelerated. E.g. Devise to A for years remainder to his eldest son if he takes his name i.e. the testator,



and if not, remainder to C. Now if he refuses to take it, & takes it, this is substituting one for another - proved by the terms of the limitation itself. This differs from the case mentioned yesterday of the particular estate determining during the life of the testator. Heam 163. 399. 415. 16. 18. 42 R 740. 748. 160. 194. 420. Hall 229  
2 Hen B 136. 12. See Chan 4916.

with or without issue

So a devise to A in tail, and for want of issue to B. If A dies, (living testator) B takes immediately on testator's death. Doug 328  
326. Plover 240. Co E 422. 2 Hen 122

But if the ultimate limitation can't take effect, if the preceding limitation fails i.e. is void through the remoteness of the contingency, for the ultimate one takes effect as a substitute for the other. But the preceding was on a contingency too remote, a *fortiori* the latter is too remote. The preceding is bad in its creation E.g. devise of personal property to A, and if he die without heirs of body to B, remainder on contingency to C. A dies (ut supra) - Now can C take? NO. C can't take on failure of B's remainder for the limitation to B was void, for the property is personal and so the substitute can't precede the principal. 2 R 251. 245. 2 Hen B 662. 160. 131. or 4. Heam 477. 18  
 So if a subsequent limitation depends on a prior one, and the prior one don't take effect, the subsequent one can't E.g. to A for life, remainder to the unborn children son of B, A refuses the grant, so there is no particular estate, here the remainder falls whether vested or contingent. 2 R 251. 4

Executory devise

Some general rules as to Expectances.

vested remainders are descendable, devisable, transmissi-  
ble to personal representatives and assignable before remain-  
der man comes into possession. Personal Property is not descend-  
able, but is transmissible only. In this case the interest is, her-  
eafter, a right to enjoy at a future time. 2 word. 287. 212.

The big modern authorities the same rule is felted as to contingent remainders and accretory devices, except that they are not significant in law, but they are in Equity, and this before the contingency happens viz before the interest vests.

The latter are called possibilities, clothed with an interest. Possibility ascends. But in equity law an interest is necessary in order to an assignment. But they are assignable in equity, but not in law, because equity constitutes an agreement executed i.e. a grant into an executory agreement where it executes the effect as a grant. This is to further the general interest of the parties, so when the contingency happens Chancery will compel the interest to be transferred in consequence of the former agreement. Ream 286. 33 R 88.9 3. Ream 291. 439. 1 All 117. 1 Re Chan. 422. 43 R 248. 19 All 202.9. Dowd 34. 297. 1000. 467. 801. 112. 2 R 11. 100. 572. 1 R 11. 100.

This is now a ~~brandy~~ settled, for nearly a distinct view was taken between executors devise of real and personal estate - not now. 2 words. 213. 245. 2412

A contingent remainder or executory devise cannot be transferred

by deed at law, for there is no present interest (and a grant must be of a present interest) except the interest in the contingency, and this can't be called an interest. Flowd 432. 2 Wood 137. 22. Pow 132. 2 Bl 291. Hott 132. 1 P. 211. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Indeed tis a maxim of law that no man can convey any thing at law by deed, except an actual or potential interest, but here is neither, But the no such interest as executory devise, or contingent remainder can be conveyed by deed, yet they may both be passed away being of freehold by fine or recovery, by way of estoppel.

Here is this difference however. In the case of executory devise it can't be barred unless the party in the contingent devise himself, is party to the fine or common recovery whereas a remainder man may be barred by fine levied, or recovery suffered by the particular tenant. 2 Wood 212. 238. Co. 159.

A fine or com recovery is bar to the party and all claiming under him. Reason 310. 343.

Reason in the latter case is, the fine destroys the particular estate, and then the remainder falls to the ground. But in the former case the bar is only by way of estoppel.

An executory devise may be released at law to the owner of the land before the contingency happens. A release does not necessarily import a conveyance of any interest at all, it is only a waiver or abandonment of all the right or title a man may have. He may bind himself never to make claim. 2 Wood 213.



Executory devise.

1 Vesey 411. 11 Mod 152.

An assignment of an executory devise will be carried into effect in Court of Chan. only. Equity construes it an executory agreement, or covenant to convey. Chan. does not give effect to the grant as such, but merely as containing an agreement. They will compel the party to make the conveyance when the contingency happens. 2 Wood 213. 11 Vesey 409. 3 Barn 440. 2. 2 P. 74. 1608.

2 Freeman 250. 9 Mod 101.

But this assignment must be for a valuable consideration, or for a consideration in "the second degree" as for the advancement of a child - not enforced if purely voluntary. 2 P. 74. 1608. 1008. 409.

Events happening after the execution of a devise and before the confirmation of it by the death of the testator may vary the limitation from a remainder to an executory devise. Long 325. 6 Pall 44. 3 Barn 401. 414. 20. 20ag 476. note 1

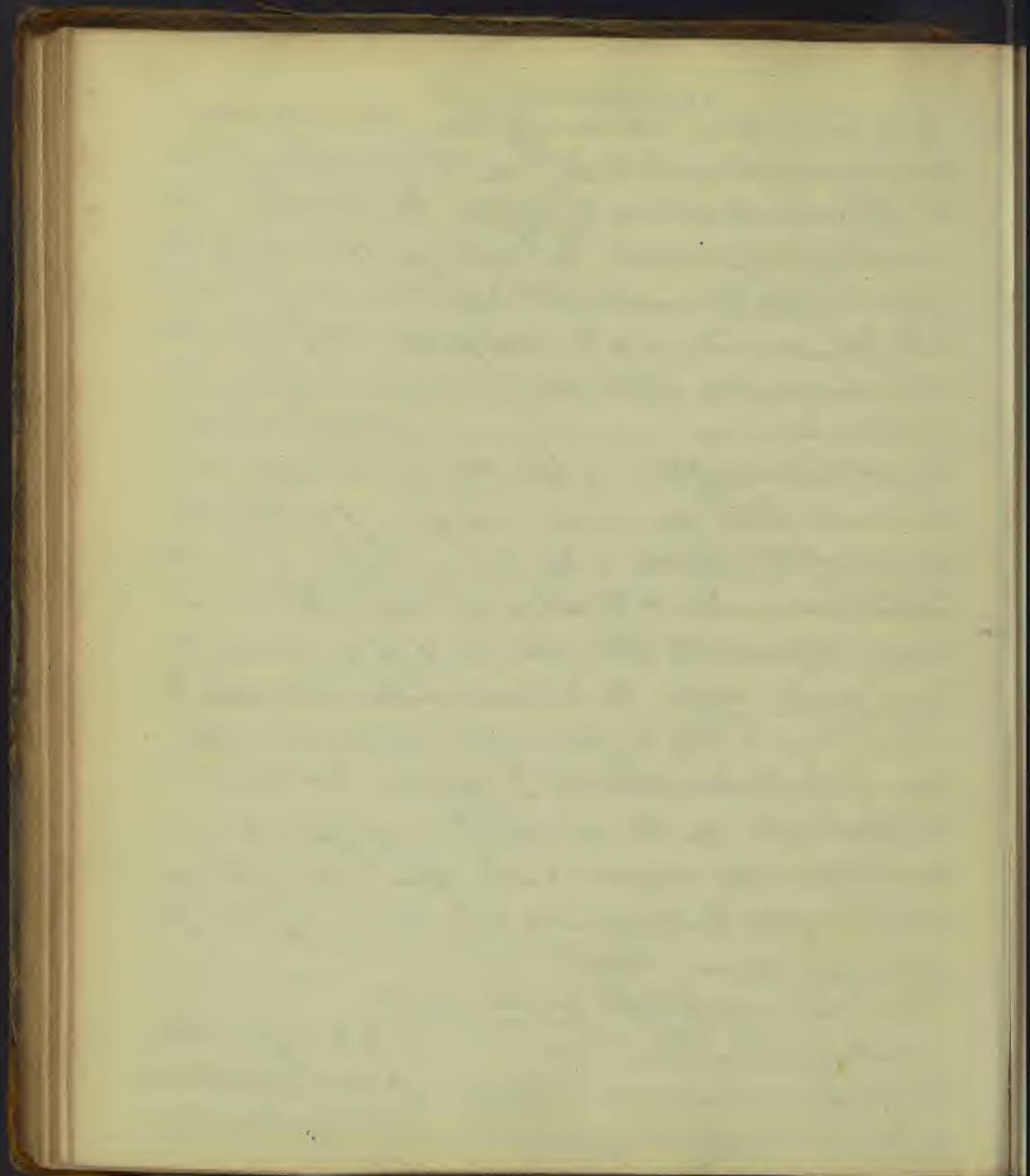
To the the event happens after the testator's death, if there is a double contingency: so that a limitation in one event that has not happened would have been a remainder may in another which does happen, be construed an executory devise. The limitation in such case is called a limitation upon a double contingency. Long 470. 476. 2 Vesey 249. or upon a contingency upon a double aspect. 2 P. 74. 1608. and this may be implied. Long 470. for here its operation as an executory devise in one event is provided for by the terms of the limitation. 2 Vesey 243. Long 470.

### Executory devise.

If the first limitation is an executory devise, those that follow will necessarily be so, and is laid down in the books as a general rule that when the first vests in possession those that follow vest in interest and become vested. This requires qualification, for the rule don't apply to remainders tho it does to executory devises, for the prior remainder may be contingent and the subsequent one vested. This last rule can't extend to cases where the subsequent limitations depend on events which have not happened, when the first vests in possession. Suppose then it is limited to A and then over to B when he arrives at 21 years of age. Here the first part of the proposition is true, because if A son is born, the possession vests in A, and the subsequent vests in A & B entire in interest. Suppose to the eldest unborn son of A, on his birth it becomes vested. Suppose the limitation further to the eldest unborn son of B when 21 years of age. Now B is born before B's son is 21, and A's interest vests in possession. But B can't vest in interest. Never does the rule apply, unless when the event has happened before the first vests in possession or during the continuance of the particular estate. Fong 475. Foote 396. Thus far of Executory devises. 20 May 249.

### Of Estates in Reversion.

An estate in reversion is the residue of estate left in the Grantor, and to commence in possession after the determination of some particular estate granted by him E.g. A lease for





years made by tenant in fee simple - now all the interest except for those years, remains in the grantor.

So again if he grant an estate for life. So if he give an estate-tail, there is still ordinary estate tho not much regarded.

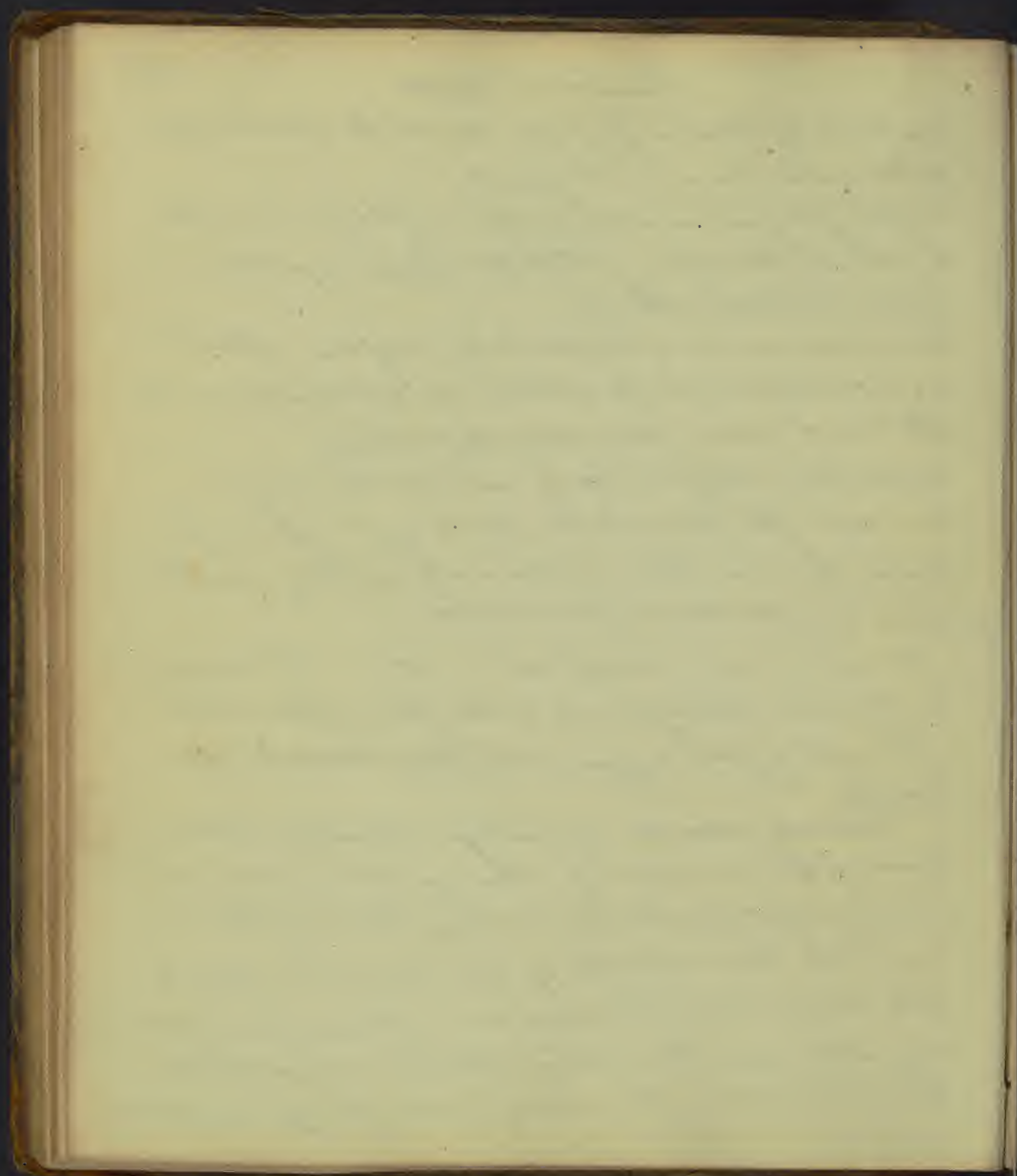
2 Bl 175. Co Litt 22. 2 Wood 172.

This reversion remains in the grantor by act of law without any reservation at all, for what he does not transfer remains with him of course. 2 Bl 175. Baco 406. 7. 2 Wood 172.

A remainder is always created by contract, compact, or in some way by the act of the parties i.e. by some species of common assent. But a reversion is only created by operation of law. 2 Wood 173. Hott 30. Co Litt 22. 2 Bl 175.

A vested reversion is transferable as well as a vested remainder, for tis an estate in present to take effect in futuro i.e. tis a fixed right of future enjoyment. Co Litt 22. Hott 30. 3 Bl 175. 2 Wood 173.

There may at common law be a contingent reversion. I know however of but one instance. E.g. A conveys to B and heirs or heirs or qualified fee, while they continue tenants of the manor of Dale. This is defeasible by their ceasing to be tenants of the manor of Dale. So it may be an estate in fee, and it may not be a fee. The reversionary interest is contingent till the event happens, afterwards tis vested. 2 Bl 179. King authorities.



Remainders.

such contingent reversions can't be conveyed by deed, for there is no present interest, may however be conveyed by, estoppel I suppose. And so there can be no attainment in this case.

As reversion is created by act of law only, it follows that if a man grant an estate for years, life &c with remainder to himself in fee his word, for what he thus limits to himself as remainder is a reversion. The old estate never passed out of him, tis a remainder not a reversion for the law continues the old estate in him of course. Tis as absurd as for tenant to enclose himself. 2 Bl 176. 1 Wood 173. Co E. 321. 3 Lev 406. 7.

On the other hand, if one should grant an estate to A for life &c receiving rent with reversion to B and heirs, This is not a reversion but takes effect as a remainder because tis created by act of the parties, tis an improper use of the word reversion. 2 Bl 176.

When rent is reserved on a lease tis incident to the reversion - so that by a general grant of the reversion the rent will pass &c, et convey, reversion to B, now the rent is due to B. Co Litt 143. 2 Bl 174. 6.

But rent is not inseparably incident to the reversion for there may be a special provision to the contrary, and by it the rent may be granted without the reversion, and the reversion without the rent. E.g. the rent may be granted for 10 years, and after that it is due to the grantor.

But the the rent will follow a general grant of the



Reversion.

reversion get the conveyance is not here i.e. by a general grant  
the rent the reversion will not pass. The incident follows the  
principal, but not the principal the incident, for acceptance  
non ducit sed signatur manus principis. Co Litt 151. 2. 2. 30 176.

It is a rule of common law that a life tenant cannot convey the  
reversion till the life tenant enters. This arises from the necessity  
attornment. For the Lord could not alien his lordship with-  
out the consent of his tenant and vice versa - which is called  
attornment.

This doctrine of attornment by 1455 of statute and 11 Geo 2  
has ceased. So I think the rule does not now obtain in Eng<sup>d</sup>. Th. the  
U. States the doctrine is unknown, and so I suppose no necessity  
for it here. Litt text 56y. Co Litt 46. 2. 30 72. 288. 290. Attornment  
derived from feudal principles 2 Bl 72. 288.

The reversion may pass under any words that are descriptive  
of the interest, so that the intention is intelligible. If a con-  
veyance of one's "lands" is made, the reversion passes if he has  
no other interest. Reversion is the most proper word 10 Co 117.  
Now 438. 2 Wood 174. even before the Stat. of frauds, a feoffment or  
conveyance could pass <sup>not</sup> by mere deed, and attornment <sup>only</sup> by  
fine & recovery, for no livery of seisin can be made of it  
it being an expectancy. But a vested reversion for years may  
be passed without deed. There must however be some word

-mandum agreeably to Stat. of frauds. There may be reversion of a chattel interest. 2 Wood 174. Litt. text 567. 2 Wood 175. Co. L. 143.

A devise of a reversion was always good without attornment, as a devise of an estate in possession is good without livery. Reason is, to require attornment would defeat the devise, and it applies only in case of grant. 2 Wood 174. Perkins 20567.

A reversion may be conveyed entire, so it may be subdivided, and then conveyed. A particular estate may be granted out of it, and still there may be a residuary interest in the grantor. E.g. Reversion grants an estate to B for 10 years, and so to C for 10 years from and after limitation to B ceases. 2 Wood 174.5. i.e. that is to commence from the expiration of the subsisting particular estate.

There may be a reversion of a chattel real. E.g. Livery for 50 years lease, for 120. 2 Wood 175. 3 Lev 154.5.

The reversioner's expectation on the determination of a fee tail is so remote, that the law for many purposes regards it of no value whatever.

Another reason is the estate can always be docted, and usually will be i.e. the reversion is in the power of the tenant-in tail, so for the purpose of assets. The heir never can be subjected on the covenants of the ancestor, on the ground of his having assets by descent - provided he has nothing but this reversionary interest. See Mot. 443. 3 P. W. 235. not assets.

Some rules as to Expectancies.

Is a general rule that if a greater and less <sup>in the same subject</sup> estate meet in the same person without any intervening estate the less is annihilated or merged in the former greater. As if a fee descends or is purchased for the tenant for years, the estate for years ceases, the better and greater interest absorbs the other. This rule proceeds on the ground that the union of two interests is a virtual surrender of the particular estate to reversion. If the law did not merge the less estate, he could not surrender to himself. 2 Bl 175. Co. E 302. 3 Lev 437.

So cause a merger the estate must meet in one and the same right in the same person. So if he has a fee in his own right in the same person, & if he have a fee in his own right, and a term for years as Executor, the term for years continues, and this is right, for if a merger took place the term would be no more and thus creditors would be defeated & injured.

So also if reversion in fee holds the particular estate in right of his wife there is no merger, if there were her interest would be lost. 2 Bl 177. Co. E 275. Moor 418. Co Litt 338.

But if an estate tail and reversion in fee should meet in the same person, and the same right, there would be no merger, for no actual surrender could be made by tenant in tail, or destruction of the estate except by fine &c. so the law will not

allow a constructive one. Indeed the interest of third persons concerned who take her person down, and can't be shipped of their interest without his or recovery and there are difficult conveyances to make. Of course the interest is such as there is some chance of enjoying.

2 Bl 177 s. 2 Co. 136 74. Co 6302.

Of injuries to things real.

Here I shall treat of 3 only. 1<sup>st</sup> Trespass. 2<sup>d</sup> Ejectment, 3 waste. - 1<sup>st</sup> of trespass to things real. Trespass in its most extensive sense means any transgression of law. But in the more limited sense it means any forcible injury done to the person or any property of another. But as I here shall consider it, it signifies the entering on another's lands, tenements or hereditaments without lawful authority and doing some injury or damage. 3 Bl 209. Co. 2 Tres. a. 2.

Every unreasonable entry on another's land is a trespass and is called trespass by breaking his close. Every such entry implies some damage, as treading down grass, breaking down a fence, or even the throwing of stones on the ground.

So proof of entry is sufficient, so far as he is in possession he violates the right of the lawful owner. 3 Bl 309, 10. 3 Bl 380, 381, 382. 2 Swift 74. In trespass the entry should be unlawful or unreasonable. For in certain circumstances an entry on another's land is allowed by law without licence from the owner.



Peppap to Rest Proberly

P.S. Officer may enter one's land to serve legal process, tho he may not break the mansion house for this purpose.

2. If also if debtor owes money, which is to be paid on the hand, or creditor demand money, he may enter to make payment or tender. The contract amounts to a licence the law is said to grant the licence, as if there is a contract to pay rent at a certain place.

to also be lawful to enter on lands of another to take dis-  
tress, when a person has a right to distress. E.g. a clause of dis-  
tress in default of payment of rent.

to also a Revisioner may enter to see whether waste is committed  
to or if committed, there is a forfeiture of the thing wasted.

It also a traveller has a right to enter a common inn. The law gives a licence. Indeed opening an Inn is an implied contract with the public to allow an entry. 11 R 292 or 211, or 232.  
860 146. Eph D 330.

So if A leases lands to B excepting trees A may enter to take away or dispose of trees. 10 Co 46. Pl. 381.

So also one may justly entering on the lands of another for the purpose of destroying ravenous beasts - This is grounded on general expediency - Lions with other animals. 5 Bac 130. 2 Bulb 82. 20 J 921.

19R 24. Contra Sm. L. tit. Lich. d. 2. 2 coll 53-8. 19R 334.

And in this case the horse turning may not dig so liberally, for  
thus a lasting injury might be done. Same authorities at once

happens to the party

but this authority does not extend to animals not so common as a  
 horse. A principle of policy requires it. 5 Bac 150. Salt 454. 2 Inst 64.  
 It is laid down in the books that if a cat starts a hare on his own  
 land he may pursue him on another's land. This is questionable  
 on principle. I know we in practice go on another's land to kill  
 any wild animal. Why should we have a right since policy  
 does not require it. Salt 556. 11 Mod 75. This book is of little au-  
 thority. If an animal *ferac natura* is started on my land and  
 killed, then it is mine. Secus if driven on another's ground and  
 there killed, it is then the hunter's. Esp 404. Salt 86.

If he might pursue a hare he might a flock of pigeons. And  
 that the poor have a right to enter on lands to glean there,  
 after harvest is reaped. This is now settled to the contrary,  
 by G. B. Esp 418. 3 B & C 212. 1863. 51.

But in regard to <sup>them</sup> and similar cases where the law gives a  
 licence, any subsequent unlawful use of the authority so given  
 makes the party a trespasser *ab initio*, for his said legal pre-  
 sumption arising from the subsequent act, is that he entered ori-  
 ginally for the purpose of committing the unlawful act.

This is not the true reason for it would apply also in case of a  
 licence given to the party. But in such case he is not a tres-  
 passers *ab initio*. So the rule vide 3 B & C 213. 86 116. 5 Bac 161. 207 118.

Mich 472. Salt 561. Esp 381.

Exple and Regl<sup>l</sup>

Now suppose a traveller having entered a tavern should steal, he becomes a trespasser ab initio by relation.

So also if a landlord having distained for rent sells the distaff or wastes it, he is a trespasser for entering the land or for taking it in the street.

And here if justification is made the Off<sup>r</sup> may make a good abatement of the subsequent trespass, and this is sufficient. Quitch 147, 3 B & 213, Exp 381, 381, 383. Goj 147, 19 R 12, 36 146, 3 Ann 161, 1 R 12.

But in general a bare nonfeasance or neglect can't make one a trespasser ab initio by relation. It more neglect or omission is not itself a trespass.

I think the subsequent act must be a trespass itself, independant of the licence in order to make the person entering a trespasser ab initio. The wrong then must be a tortious act. Nonfeasance to make one a trespasser ab initio.

So if a traveller after entering a tavern refuses to pay his entertainment, this is a nonfeasance, a breach of contract and don't make him trespasser ab initio. 5 B & 161. 2. 3 R 1263. 36 146. 7.

So if a distainer of goods should refuse to receive the distaff on payment of rent or on tender of amends before impleading, this is a nonfeasance even if he should work them. 5 B & 162. Kennedy is case.



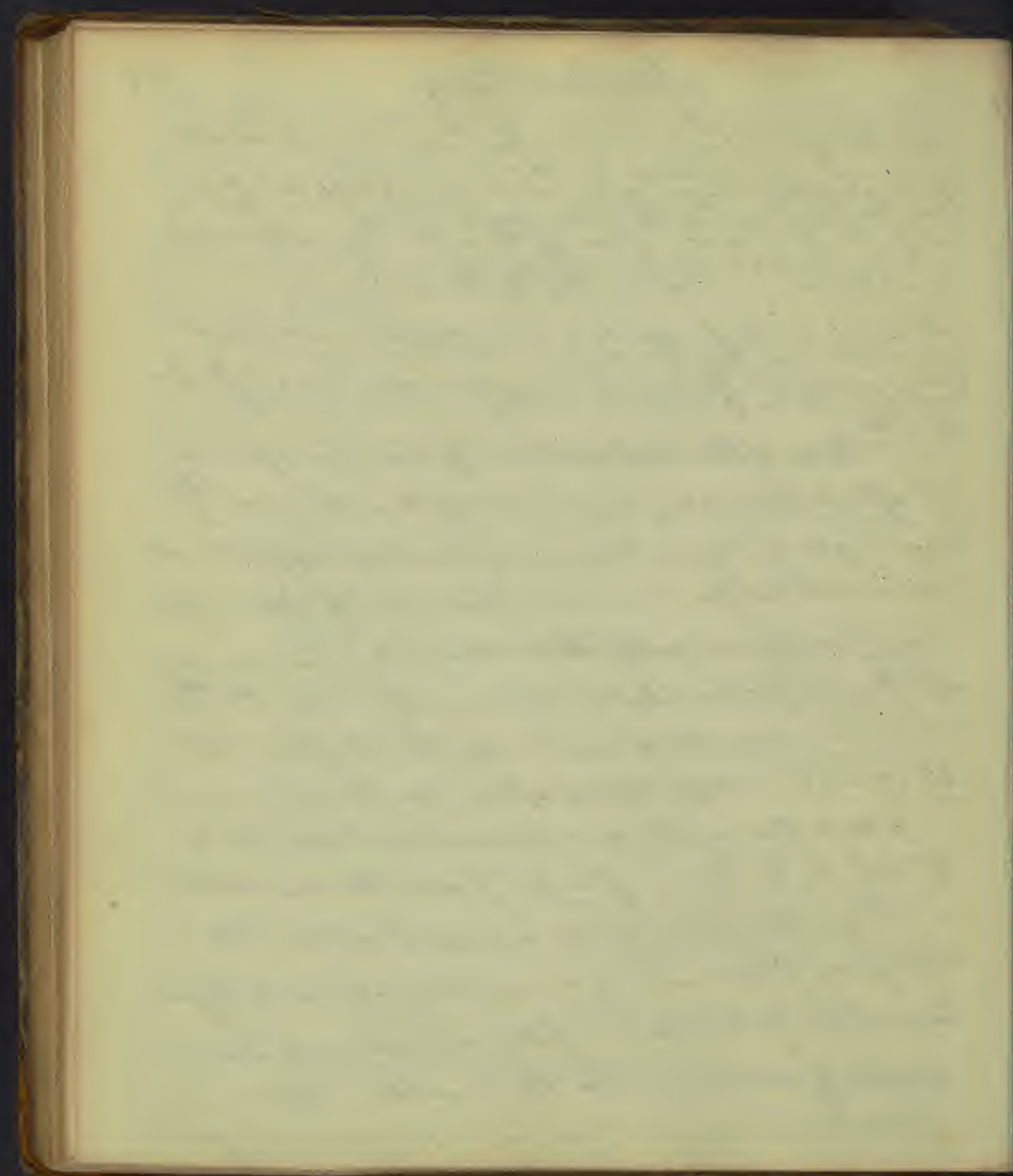
But this general rule as to misfeasance it is said admits of one exception in case of a writ on mesne process, not final process, suits to make return of the writ. I say not final for the debtor has no interest in that tho the creditor has.

In case of mesne process he is interested for he is bound to make return. So if he suits to make return he is a keep paper ab initio.

Reason of this exception is, unless mesne process is returned after it is returnable, tis not admissible in evidence. E.g. Writ made to day, writ returnable next Monday, tis not returned, still he offers it in evidence in a suit for false imprisonment, how he can justify till tis returned, tis a consummating act. He must plead matter of record in justification, but till returned tis not matter of record. 5 Bac 162. 2 Ray 632. 5 Co 98. 1alk 409, 4 Co 67.<sup>a</sup> 1 wils 171. Cowp 20. 2 Esp 412. Vide false imprisonment.

I think there is still another reason that operates in this case tho the last is sufficient. I suspect this is true. Whoever are acting under licence of law is bound to do some future act, by way of consummating or completing what he has begun. The omission of the utterance or future act will make him a keep paper ab initio. The principle I take to be this, that when a man has begun an incipient act, and neglects



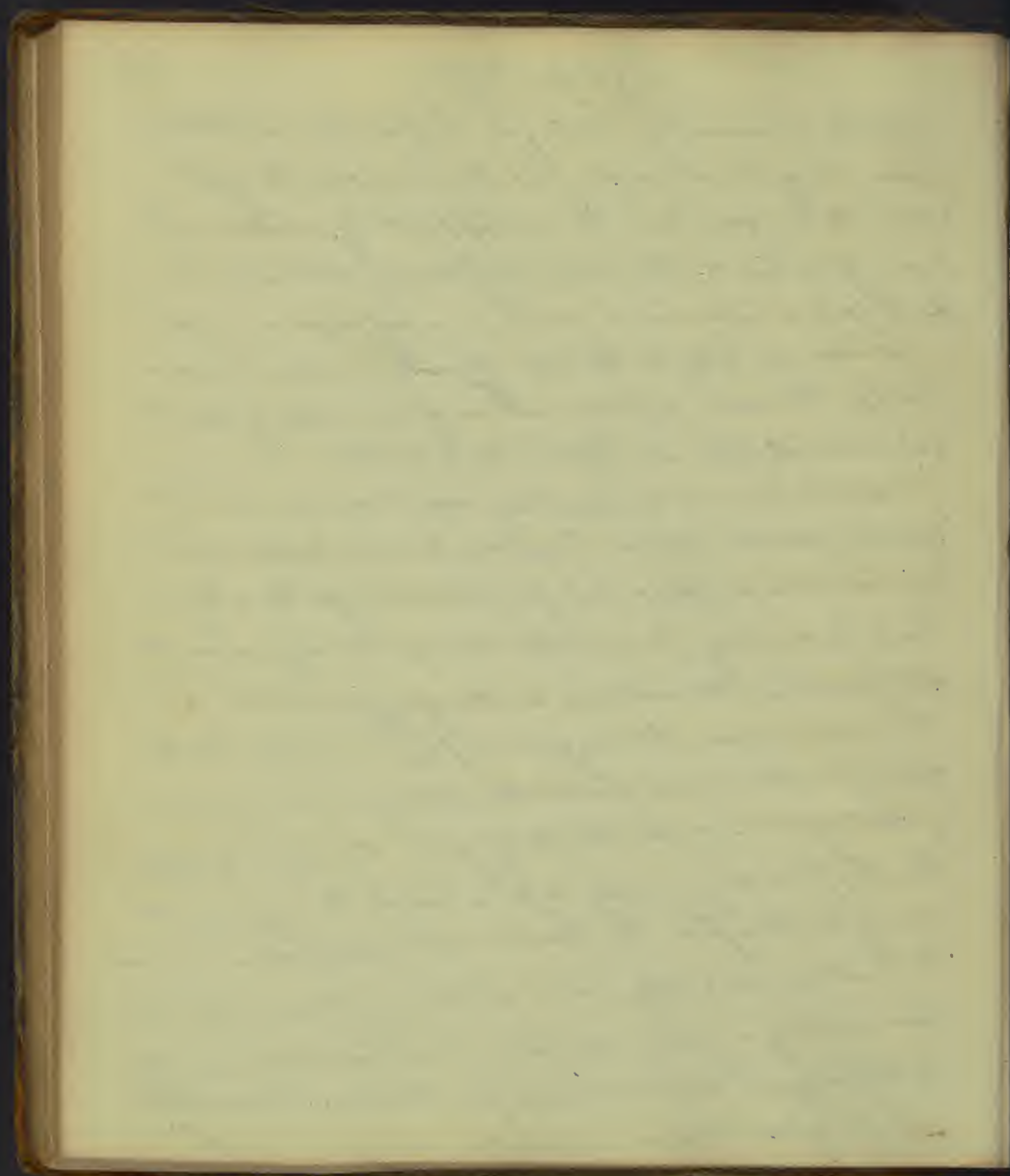


to do the communicating act to give it effect, to incompetent for him to say he acts under this. He at once does the right which the law gives him. He is a trespasser by relation. I know of no case of this kind, so if having disclaimed, he should fail to uncompound he would be a trespasser ab initio.

But when one enters on the land of another, under licence in fact from the owner, a subsequent use of the authority, does not make him trespasser ab initio. 5 Co 142. B. 8 Co 146.

I direct a person who knocks at my door to come in, and he afterwards commits a trespass. I can't sue for an unlawful entry, I may indeed sue for trespass. But if I should sue for the entry, I should fail entirely, for a justification of the entry covers the whole grievance, the rest being matter of aggravation.

The reason is where the law gives a power in relation to the right of another, it will protect the latter against any abuse of that right. But when the party gives the licence he takes the risk of his doing a wrong, so far as respects the original act done by his permission. He should in his contract have annexed the limitation expressly, which the law in the case above annexes simply in giving his licence, he indeed has his remedy for the subsequent act. 5 Bac 162. B for the reason. He also trespasses for injuries to personal property.



## Trespass to Real Property.

415

Said in the books that to constitute trespass the act causing the injury must be voluntary, for if done involuntarily and without fault no action lies. This is not correct as general proposition. Taken to refer from time, as a general rule in any sense, that sentence is always wrong or untrue. Exp. D 383. 5 Bho 185. Sta 65.

I think this rule never true where the fault complained of is in fact committed by the Deft. himself, and yet it seems so laid down to apply to this case alone. The intent in trespass is not regarded for civil purposes. To be sure in criminal cases mens rea is necessary. So lunatics, infants, and idiots are liable civiliter in trespass. So also if a man raises a cane in self defence and hits one behind him he is a trespasser. Malice may aggravate damages, but don't effect the issue. Foot 134. Co 399. 1 Grant 81. Ray 486. 2 B. R. 896. Latch 13. 116. 119. Dong 649. 5 Bac 179. 12.

At any rate it can't be true that the wrong must be voluntary.

It is equally true that mistakes or accidents not inevitable will not excuse in cases of trespass. So if a man breaks another's door thinking it his own, he is a trespasser and liable civiliter.

Action of ass. and battery. 5 Com. Sup. C. 1.

If a person should strike a servant in his house thinking it was a burglar, he is a trespasser. 3 Leo 37. Com. Sup. C. 1. 3353

The rule then applies only in cases where the act complained of is only constructively the act of the Deft. E.g. Deft's dog chased



Trap to Real Property.

Drifts cattle on his own land, He had a right to set him on, and then it is his nature to pursue them, therefore as he did not intend it, he was not held liable. The act here is that of the dog left only constructively and not in fact. For if he don't use due diligence to call him being a mere instrument. An act can never be the Drifts constructively unless his mind concurs.

So if a dog goes voluntarily and kills a deer tis not his act, occurs when he shoots a gun, or kills even by accident. Case 2092. 4th 101. 10th 110, 119, 1st 583.

The same rule applies in case of an act done by a servant, in which there is of importance to show whether tis his masters act or not. Tis not his act if not procured by him.

The action of trespass for an injury done to things real will not lie if the subject, or land is in a foreign country. The reason is if the subject is local the action is local and not in rem. His general rule that when the subject is local, and the remedy is local. So Ejectment will not lie for lands in Eng<sup>d</sup> since the judgment operates in rem. 1st 402. Comd. tit. trespass. d. 646. 4, 9, 1503.

Transitory actions may be brought any where.

This action when brought for an injury done to land, is called trespass quare clausum fregit, taken from the words of the writ in the register. The word clausum in Eng<sup>d</sup> is endo-

Since If the action is for an injury to Offs, house is called quare dominii so Cor D Reple B.1. Plaintiff 87.8.381.209.

Thus far of the general nature and incidents. Next of particular decisions.

1. Who may maintain this action? Is a general rule that no person can maintain this action except him who has the actual possession at the time of the injury done, so remainder man and reversioner can't maintain it during possession of particular tenant, Reason is, this action is intended as a remedy for an injury to possession. Remainder man so must resort to other actions. Exp. 333, 404. Cor. & Reple. B.1. & B.5 Bac 166. 37.9. 3 Lev 209. Latch 263. 2 Bulst 268.

4 Leon 134.

So the action of reple is founded on possession, i.e. it is a remedy for an injury done to the possession. A. Corneet seems that a bare right of possession is sufficient, provided no other is in actual possession - because if Dispossessor is for three the dispossessor has actual and adverse possession. "Ejectment"

Said in the books that the possession in this case must also be lawful, and that an intruder of course can't have the action.

This as a general rule is incorrect. How 546. 4 Leon 134. 220 147.

Swift 76.7. I think the rule applies only as between the wrongdoer in possession, and the rightful owner i.e. he who has the right of possession. Lately decided that any actual possession

Rep. to Real Prop.

is sufficient to support an action ag the wrong doer. The object of this action is not to try title. To be sure the right of possession is a good defence. Possession is title sufficient against a stranger. In fact the whole res gesta consists in this case in actual possession, and an invasion of the possession by the Deft.

1 East 244. 11651. Wills 221. 2 Sta 1238. 3 Burr 1568. Lawes 156. 7 Ely 488. (Thus in Ejectment there Plff must have a right of Possession)  
2 92 249. 5 Conn 2. 12 Rep 32. 11 Ely 7.

It follows that a person in whom is the freehold can't generally maintain an action for an injury done to it while in the lawful possession of another, even tho the injury is to the freehold itself.

1 Coll 554. Leeson 184. 5 Bac 166. 39. Conn 2. 12 Rep 32. Actual possession in the Plff being necessary. If the party in possession is a wrong-doer no distinctions exist.

Case of tenant at will is said to be an exception to the rule. Person in the tenants possession is so precarious that the owner is considered as having possession.

Can hein can't maintain this action at law unless he has obtained actual possession by entry, tho he may make a lease before. This don't apply in Conact for he can maintain it provided no other is in possession, for he is in constructive possession. Nov 142. 2 Coll 558. Ely 2. 404. 5 Conn 12. 12 Rep 32. 5 Bac 166. 40 Ely.

Again, a person seized of lands can't according to this rule, before  
before



reality maintain this action for an injury done to it between the time of dispossession and recovery for he is not in possession at the time of the injury. Com. D. Rep. B. 3. Exp. D. B. 5. Sac. 166. 44. 2 Roll 55 B. Pl. 4. 5. 550.

But said if the parties right who is dispossessed determines in the mean time so that he can't recover, he may have trespass for an injury done after dispossession. This is from necessity, since if it were otherwise he would be remediless. 2 Roll 550. Com. D. Rep. B. 2. This is rarely laid down.

But after dispossession and actual recovery he may have this action against dispossession for all acts done during the dispossession for as between these parties, the possession of dispossess after recovery is considered by relation as having been continued. This fiction of law is introduced for the very purpose of giving him a remedy. Fictions never work injustice. We may therefore have an action for the mesne profits and must lay his action with a continuance. 11 Co. 51. a. Hob. 48. 2 Roll 554. 550. Roll R. 100. 1. 2 Inst. 282. Co. Litt. 25 p. a. Com. D. Rep. B. 2.

But even after recovery the party dispossessed can't maintain this action as 3 persons i.e. strangers, for injuries committed during i.e. between the dispossession and recovery, for here the fiction don't apply, it obtains only between dispossessor and dispossessed.

Thus A dispossesses B for 6 months and during this time J. S. enters and



Reply to Lord's Reply.

Supposers now the dispossessor can't have trespass against J. Stiles. The same is true if dispossessor conveys to J. S. and he goes into trespass, and afterwards B gains actual possession still he can't have trespass vs. J. Stiles. 5 Bac 188.

Authorities are contradictory on this point. 11 Mod. 1. 6 Palm 98. 354.

Roll 1. Cotha 2 Roll ab. 554. 579. Co E. 540. more 461. 560 & 8 Rep B. 2.

This question is still in doubt. On principle I should think the fiction might extend to 3<sup>d</sup> persons, for no injustice would be wrought. Reasons for the rule are 1<sup>st</sup> That the purchaser it is supposed had paid the dispossessor a consideration, and ought not to pay twice. But I answer he has either made a bargain of hazard, or he has taken covenants of indemnification, and has his remedy on them. 2<sup>d</sup> If said the stranger is liable to dispossessor if there was no contract, and he ought not to be subjected twice.

But I answer perhaps the dispossessor is not responsible. I think it more reasonable the 2 dispossessor should run the risk of paying twice than the dispossessor should be exposed in the least degree.

But the rule that the dispossessor after recovery can't have this action as a stranger holds at any rate only good actions <sup>against</sup> not good protection. as the second dispossessor, for the dispossessor may after recovery take the crops of the land which grew during the dispossession whenever he can find them. Reason is the artificial difficulty arising from the fact that the action don't apply

here. The act of the wrong doer may alter this right of action, but not take it away, nor take away the right of property.

11 Co 51. 22 In 31. Holt 132. 5 Co 85. a. 26 E. 61. 464. Doug 21. Co Litt 55. b. 1 Roll 726. 7.

Then arises the question whether disseisee may have an action, as before for the conversion or use of the profits by the second disseisor. ~~Secum~~ he can. Doug 21. 80. Powd Mort 784.

Disseisee may before recently maintain this action for the original disseisin, for this was committed when he was in possession. It was an invasion of his possession in point of fact. & also for a trespass committed before his disseisin. 5 Bac 165. 61. Com. D. Ref. B. 2. 2 Roll 553.

A person who is tenant at will or sufferance may have trespass only against a stranger but not ag. lepor or landlord. The truth is the entry of the landlord in these cases determines the estate. 1 Sid 347. 7. Roll 551. 5 Bac 167. 136 69. Co Litt 57. 2 Bl 150.

But lepor for years or life may have trespass against lepor. 1 East 139. 5 Bac 187. 2 Inst 105. Yet Ch. G. thinks lepor at will may have trespass against lepor for invasion of easements, for these belong to lepor. 2 Bl 146. Said however that lepor at will can't have this action against any one who enters without a by color of right. This can't be said for such person may actually be a wrong doer and against such an one any possession is sufficient. 1 Sid 347. 5 Bac 167. 157. 5 Com. D. Ref. B. 2.

### Rep to Real Property

Said that Repor at all may maintain Rep against a stranger if the trespass injures the land. Reason is Repor is of Repor at will is that of the Repor. He is a species of tenant and is liable to be turned out at pleasure, has no adverse right to the land, on which they stand. Of course he may have this action against any one, who enters or injures them during the term.

5 Bac 167. Com. D. Lit. 9<sup>th</sup> B. 2. 2 Roll. A. 5-51

If the lessee commits voluntary waste, Repor may have trespass quare clausum, eg. him, for such an act determines the estate, and of course puts the Repor in Repor and makes Repor a stranger with permissive negligent waste, for this does not determine the estate to Lide 5<sup>th</sup> 2 Roll 561. Com. D. Rep. B. 2.

A person entitled to the reversion or herbage of land may have the action of quare clausum, eg. for the injury done to it. This supposes he has a present interest and possession of the reversion &c at the time of the injury. Eg. Pasture let for the term 3 B. 1. 210. 10 E. 421. Dyce 285. 2 Roll 552. 5-49. 1 Inst. 4. Com. D. Rep. B. 1.

5 Bac 167. Altho so much Rep is laid on being in Repor, yet Repor need not be in possession of the land at the time of bringing the action. It is only necessary to be in possession at the time of committing the trespass, for then the right of action accrued. Eg. Rep on land to day which he sells to morrow, here he may have the action after having sold. 10 E. 431. 2 Roll 569. 5 Bac 157.



1. 5 Cow D Dep. B. 2.

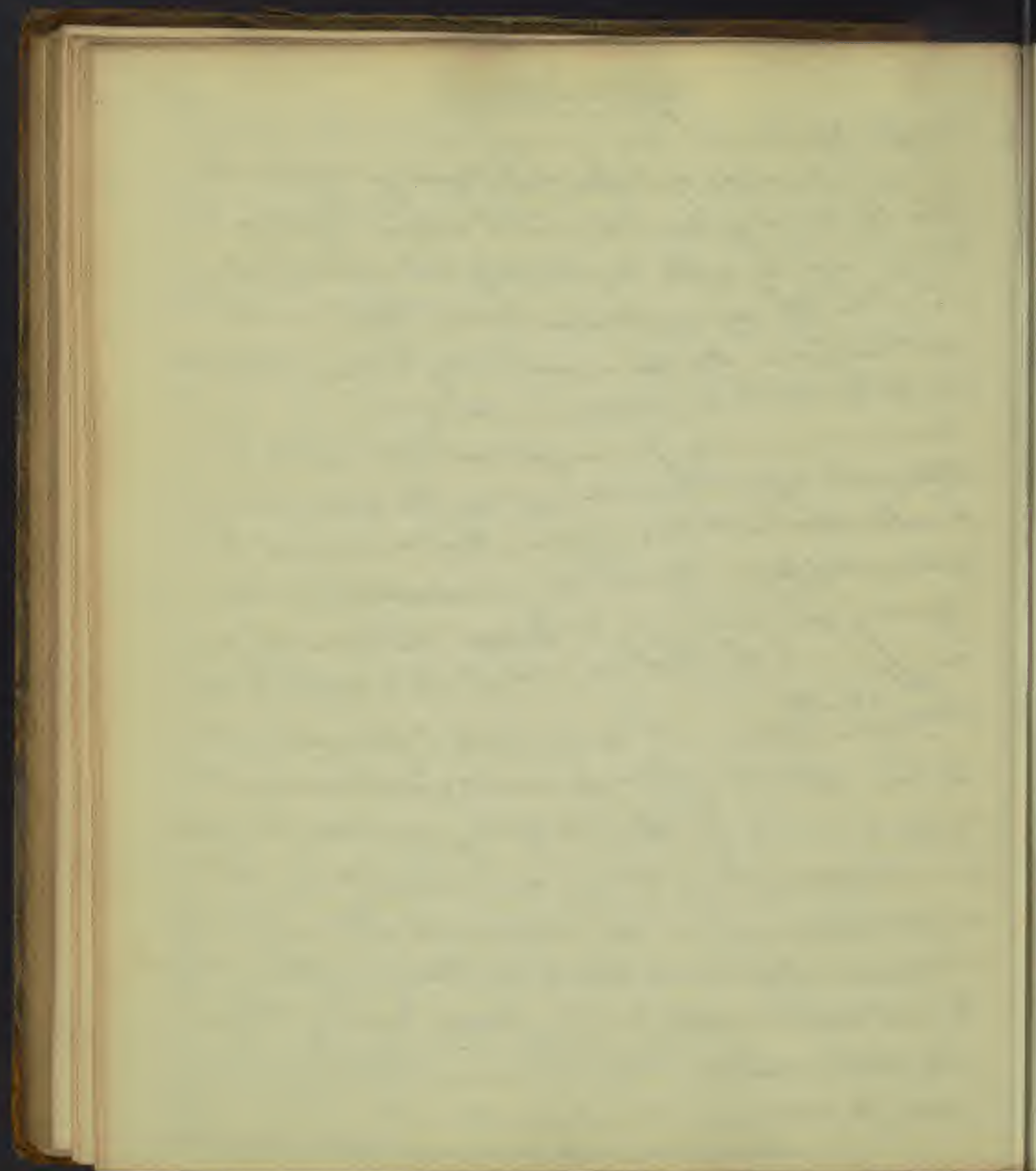
The owner of the soil of the highway may have this action for an injury done to it while it remains a highway. It being a highway entitles the public only to the right of passing over it. The title, soil and possession continues the same in the owner unless some other person ousts him by enclosing it & the torts. Barr 148. Exp 428. Contra 1 Bal 157. not law.

Question has been made if a man lets land to another to till on shares and an injury is done, who must bring the action, said by Jones the owner must bring it alone. Tenant can't join for he has not possession before the crop is sown. It is agreed that they may join for an injury to the crop, tho' not in trespass. clauson paget. 100 E 145. Holt's 68. which should be brought by owner alone. 5 Bar 68.

Got in trespass on the case he said, that if a man with the owner of the soil to plow and sow and give the owner, if the injury is done to the crop, B may may sue alone in trespass. quere clauson paget for heading down the corn, for said that A has no concern with it till sown, and is not jointly interested before, and then he is entitled to his share & a species of rent. He can't have the action for injury to crop, but may to the freehold. B. & W. 85. E 402. These rules seem contradictory or inconsistent. The latter appear to me preferable.

Husband and wife must join in trespass committed





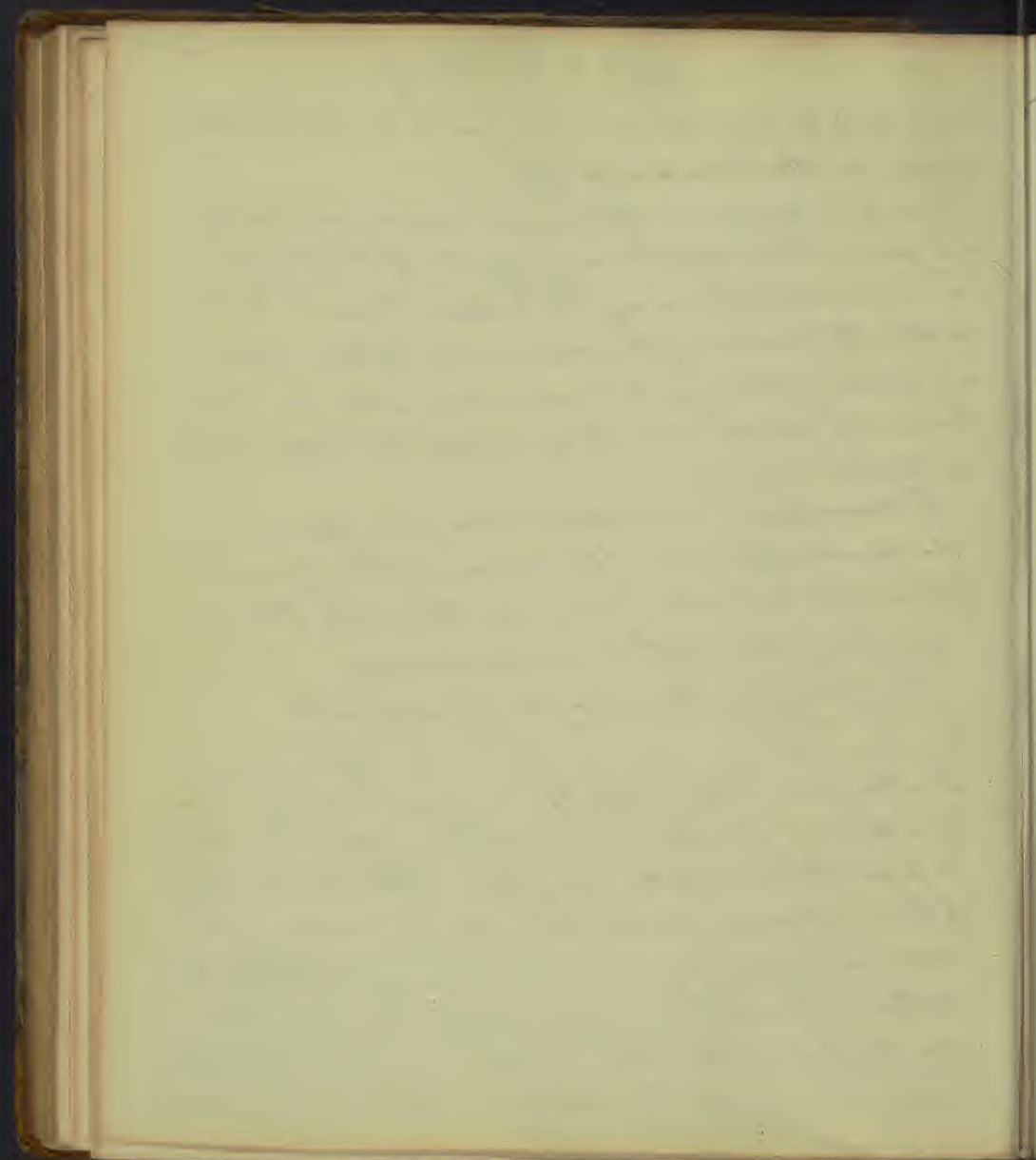
on her land for the action would survive to her. Co. C. 96. 133  
Exp 404. See title "husband and wife"

Tenants in common or coparceners, as well as joint tenants  
must join in this action for an injury done to the subject  
held in common, or parcenary. The action is personal, the in-  
terest in the personal right is common and the their estates  
are several, yet damages to be recovered are entire - can't be  
severed. See text. See 315. Co. L. 198. 2 Bl 196. 2 H. B 387. Exp 404.  
See "tenants in common".

If a commission of Bankruptcy has been issued against one  
who was not subject to Bankrupt laws, and the assignees take  
possession of his real estate, he may have this action the com-  
mission being void. Hard 480. 3 Wils 382. Exp 398.

On what injuries this action lies and what not.

Every man at Com law is liable not only for his own trespass, but also for  
his cattle's injuries in trespass, if they by his negligent keeping stray  
upon the land of another, and much more if he drives them.  
To subject the owner for the injury of his cattle he is not to be  
to prove negligence or fault, whereas for injuries done by do-  
mestic animals, as by dogs, he is not liable unless he knows the  
creature is addicted to mischievous tricks. In case of cattle  
qua. dan. fugit is the action, in other cases case is the proper  
action. See no reason for this distinction or difference. 3 Bl 211. 5 Bar 179.



But if the cattle of one enter and do damage on the land of another, thro the neglect or fault of the other is not having his fence good, which he ought, no action lies. 2 Roll 568.  
5 Bac 131. vide "Replevin"

And if Cattle of one are on the land of another wrongfully the owner of the land has his election of two remedies, he may either dischain them damage feasant & hold them unpounded till satisfaction made, or have the action of ga. clam. pag.  
3 Bbl 211. Exp 386/5 Bac 179.

This action lies against an atgrister i.e. one who takes cattle to pasture for another. So if the cattle stray out of his pasture into that of another. Some say the action must be brought against the atgrister and him alone. I think it may be brought against either. The atgrister is bailee of the cattle. and for the sake of redress he is the owner. 5 Bac 183. 9. 2 Roll 546. Exp 387. Where the owner has his election of two remedies as in this case between trespass, and dischain damage feasant, he cant regularly have both, nor pursue both; one is a bar to the other. and either is sufficient for he is entitled to but one satisfaction vide "Replevin for Distraint"  
1 Holt 248. 12 mod 668. Exp 387.

But the owner of property is not of course liable in all cases for the injury it may do to the property of another. Eg The tree of A is blown down on the land of B and injures it. it is not liable, may be may enter on the land and bring it away, tis an



Ref to Real Property.

inevitable accident, and the rule as to this is, that he on whom it falls must bear it. 5 Bac 178.

But if A falls it on the land of B he is liable provided he could have prevented it by proper caution, and he may not go on B's land to bring it off. 5 Bac 178. 2 Bl R 895. Long 179. The latter not inevitable. If A's timber floats on B's land and does damage, A is liable, not in trespass I think but case. I suppose his liability is on the ground of negligence. 2 Hen R 257.3.

If A puts his horse on B's land, he may not go after him, even if the horse is stolen and put there. here he will be justified. 2 Roll R 55. 5 Bac 178.

If the fruit of a tree falls on B's land, A may go and gather it, and not trespass. If he has a right to have a tree in that situation, the falling is inevitable. Lalk 120. 5 Bac 178.

But if the roots of a tree standing on A's land extend into B's land, they are tenants in common of the tree and fruit - even if the roots do not extend into B's, even tho it overhangs B's land.

18 Ed Reg 739. Bot 285. In that case the whole is A's.

A man may enter on another's land to do his duty as to build or repair a bridge. 5 Bac 179. and cannot do it without going on B's land, he is justified in going on the land, by necessity.

If A has sold trees growing on his land to B, B may enter on A's land, to cut and carry them away, that is implied in the contract. This is precisely like the case of land sold which is surrounded by the land of the grantor i.e. in the

body of his farm in which case the law gives a right of passing and re-passing to and from the land. 5 Bac 180. 2 Roll 567.

Anciently it was holden that entry of one on another's land adjoining a navigable river for the purpose <sup>finding</sup> ~~launching~~ boats or navigable craft was justifiable - Public good - This is now decided to be law. 1 D Ray 725. 6 mod 163. Contra. 1 Burr 86. 292. 39 A 253.

It is well established that if a Public highway is impassable travellers may go on the adjoining land for the purpose of passing, required by public convenience.

This supposes the road obstructed for he may not go on the land, because tis more convenient. 1 D Ray 725. Dong 716. 2 Has 28. 2 B & 36. 39 A 263. Esp 400. 4th June 296. Lev 234. Where if the adjoining land is endowed. 1 D Ray 725.

But this rule does not hold as to private ways, for public good don't require it, public not interested in it. Besides the party is not bound to keep it in repair. Whereas corporations are liable to the public for not repairing a public highway. Not travellers. Dong 716. Taylor vs Whitehead. 2 Bl 96.

A man can't maintain this action for an injury done to the baggage of land on which he has a bare right of common i.e. to depasture for he can take it only by the mouth of his cattle, till so used his lot tis, he is not possessed of it, nor is it his property till &c

The entering another's house without permission given either by the party, or by the law is without excuse or necessity on either side.

As to Real Property.

is precisely a trespass even tho the door is open. The law declares it to be done with force, since it is an act which the law prohibits. How 71. 2 Roll 555. 2 Roll 208. 5 Bac 182.

But if one person has unlawfully taken the goods of another into his house, the owner of the goods may enter peacefully to regain them, the door being open. Here the owner of the house is the first wrong-doer, he may not however enter with force or against permission. As 6 246. 2 Roll 356. 5 Bac 182. The law gives the licence.

It is general rule that any person may enter the house of another without intention to suppress a riot or affray, or other disturbance of public peace. It is for public good. In both these last cases he enters by licence of law.

The law also allows to enter the house of another to pay, to tender, demand, or receive money there due if he does it peacefully. 3 B 212. i.e. the door being open Esq 380. An officer may peacefully enter the house of another to execute legal process. 3 B 212. And a house may be broken open to execute criminal process, provided the officer first demand admittance, and makes known or declares that the cause of his demand.

If he does not first demand admittance before he enters by force he is a trespasser. This is true only in cases of necessity. 4 Bac 454. 5 to 91. 4 Leon 241.

But an officer i.e. a sheriff may not break an outer door, or



16- Window of another dwelling house for the purpose of executing civil process, whether to take body or goods. 4 Bac 454. 2 do 367. 3 do 183. law 1.

Originally a man's house was his castle where he might shield himself from all civil processes and set the law at defiance. Reason given was that peradventure thieves and robbers might be admitted. This not the true reason. True reason every owner of a house was a lord of Baron or Lord. It grew out of feudal law. 5 Co 91. law 1. law 8 209. Holt 62.

But this privilege of castle is now construed strictly, extends only to outer doors and windows of the mansion house. It don't protect inner doors, trunks, chests, closets &c or any other internal enclosure, there may be made after demand and refusal made. To effect this purpose he may dismantle the whole of the interior house. But he may not break inner doors unlawfully after entering law 6. y. Holt 62. 263. Esp 604.

This rule don't hold in case of a writ habere facias possessionem which issues after judgment in ejectment, for tis in nature of things impossible to give possession without entering. Whereas in other cases the writ is not of course defeated by the privilege. 5 Co 91. 2 Bac 179. 5 do 183. "Gist."

There are some subordinate divisions here, for which see title of Sheriff.

A Sheriff may break a house to serve a legal search warrant, tis in nature of criminal process. A search warrant is defined



Rep to Real Property.

to be a warrant obtained by a party whose goods have been stolen, to search for them where he suspects they are.  
Hale P.C. 150. 2 Wils 275.

But all general search warrants are illegal. Strictly void, & afford no justification - as to search for all stolen goods, or to search for goods generally in suspicious places. 1 Hale P.C. 150 2 Wils 275. 291. Exp 399. Carth 409. Salt 408. Holt 251. Vent 31.

And as the law is now settled, to a good search warrant the following requisites are necessary.

1<sup>st</sup> The party applying for it, or requesting it must make oath to the Particular facts, and also that the goods are concealed in a particular place.

2<sup>ndly</sup> The warrant must be executed in the day time, if not done in day time he is trespasser.

3<sup>dy</sup> It must be executed by a known officer, for the law requires confidence in him, not by any one specially appointed, or authorized for the purpose.

4<sup>thly</sup> It must be executed in the presence of the informer, he must point out the place to search and take the responsibility on himself. Exp 399. 1 Hale P.C. 150. and even tho all these requisites are observed, yet the informer is justified or not by the event tho the magistrate and officer are justified whatever the event may be. If he don't find the goods, he is a trespasser at once, he assumes the risk -  
2 Wils 291. 2. Exp 399.

In all these cases where the entry was not lawful wheppap  
quare clammum pergit lies.

Now consider against whom this action will and will not lie.  
General Rule, it will not lie ag. lesee for years for cutting tim-  
ber, nor carrying away, for lesee is not in possession of close. Les-  
see has no right to the remainder timber. Litt text, see pp. 466 b2.  
Atty 88. Exp 401.

But if lesee after having cut the timber permits it to lie long  
enough to become personal chattels and then carries it away he is  
liable in wheppap not qu. clamm pergit. &c for the cutting but wheppap  
for injury done to personal property for the carrying away. This  
lies for the chattel is his, and he has the constructive possession i.e.  
possession in law.

It becomes personal property whenever the act of cutting  
and carrying away is not all one continued act, as if he should  
cut to day and tomorrow remove it. Whether it is a continued  
act or not depends on circumstances. 466 b2. Exp 400. (see above.)

If one leases lands reserving trees, whepp qu. clamm pergit will lie ag.  
lesee for cutting them for the lease don't put the lesee out  
of possession of them. *Case 107.* a first lesee is a stranger to them.

And action lies for ag. a lesee at will for cutting timber, whepp  
on the land, even tho no such reservation is made, for the very  
act determines the estate. Roll 860. Litt text see pp. 466 b2. Exp 401.  
he does any other positive injury to the subject. 5 to 13. 466 b2. Exp 401.

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Tresp on Real Property

But the action will not lie in such case against tenant at sufferance, unless lessee has entered for the act done determines the estate. 2 Bl 150. Exp. d. 400. Before entry he is not a disseisor nor stranger, but a tenant in possession.

But the trees are reserved, or excepted in a lease for years, yet lessee is not liable for injury or destruction done to them by his cattle for he has the use of the soil and a right to suffer his cattle to go at large on the land. 2 Rep. 739. Exp. d. 400.

This action will lie against an infant, idiot, or lunatic, for the intention is not material, neither is necessity. Holt 134. Latoh 13. 110

Every person concerned in committing trespass is a principal not an accessory, for there are no accessories. Exp. all aiders, abettors &c. So if A command or request B to do it and he does it, they may be sued together or severally. 1 Dou 124. Salt 409. Hale Pl. 613. 4 Bl. 36.

It is said if A agrees to a trespass committed by B for his benefit. A is liable tho he did not command or request it. By agreeing to it is meant his actually taking the benefit of the trespass. If ignorantly done, he would be liable in trespass for injury to personal property trespass or none would lie.

vide "Master and Servant" for distinction on this subject, but generally the master is liable for the acts of his servant done under his command.

If several persons join in committing trespass, the most



17 It may be against 1, 2, 3 or any number in several or joint or both joint and several. 5 Co 159. 5 Rep 669.

Said by Baco that if the party injured has brought his action against one, tis a bar to a just against another for the same trespass. This is not law. The pendency of one cant be pleaded in bar he may sue each in a separate action. 5 Baco 185. Sta 426. contra 5 Baco 192.

377 is true however that he can have but one satisfaction in one recovery in damages. He can pursue only one of them to judgment and this judgment is a bar. Reason is what was before uncertain is now liquidated and become certain, tis reduced in rem judicatum. Whereas if two are sued on a joint and several contract judgment to the whole amount may be had against each, tho only one execution can be levied, And if it is relief may be had except as against costs. In this case indeed there is always a rule of damages, and therefore a party would not for mere speculation pursue the 2<sup>d</sup> to judgment for he can get no more.

But in trespass the damages are always presumptive. Different juries would estimate them differently, so take the most. - Crof. 73. 4 Co 67. 4 Baco 185. 4 Baco 185.

A former recovery in trespass is a bar to any other action for the same offence. Co L 30. 6 Rep 416.

Said also by Baco that an acquittal of Debt in one action is bar to another. 5 Baco 185. Co L 667. M<sup>r</sup> Gould thinks this is not law. The record in one case cant be given in Evidence in the other.



Rep. to Real Property.

But in case of a recovery the record can be given in evidence only to show the fact of there being a recovery, not to affect the issue, not to show the facts. To be sure a release to one is a release to all so is licence. Indeed what is conclusive is that if both were sued together one might be condemned and the other acquitted.

If a person who has granted the vestue and herbage of his land to another enters on the land and takes off or disturbs the enjoyment or injures the herbage, Grantor may have this action against grantor. So generally a lessee in possession may maintain this action against lessor, except lessor at will and at sufferance. See 288. 5 Bac 187.

Reynolds held that if A's cattle pass through the defence of B's fence into C's close, then C may maintain this action against A tho' C's fence was deficient. Reason is C is only bound to guard against the cattle of B if there put in by him. Yet here A may may have case against B for indemnity if A is subjected, for B was the primary cause of the trespass, being committed. See 161. 1 Pean 377. 5 Bac 187.

I have now gone through the general nature of trespass, who may bring the action and who not, for what and against whom it may be brought.

now consider the Pleadings in this action of trespass *quare clausum* petit. Where the trespass committed consists in abuse of authority conferred by law, 'tis sufficient for the Pff to state the trespass generally in his declaration i.e. he is under no obligation to notice the authority given by law. The particular injury or abuse of authority given by comes out in the replication, by way of new assignment. This action was originally to be brought in the common law.

Def't may indeed plead the authority by way of justification *obj.* Suppose rent distrained for and the distress abused, so trespass for breaking house and taking goods &c breaking furniture &c justification of the entry, replication stating the subsequent wrong particularly by new assignment.

So if a person commits theft in public house, he who brings the action need not state particular facts. Indeed this would be unlawful if he may sue for breaking the house first. *Salk 221. 2d P. 51. 19 R 479. 300 292.*

That Pff in this action may include several distinct trespasses in one declaration, this is according to the rule that several causes of action of the same nature against one party may be included in one declaration; thus entering and cutting trees &c breaking his house, dishegging his goods &c *Salk 119. 2d R 146. 2d 61.*

Help & Heal Offense. Mending

and for the purpose of showing the aggravation which attended the trespass in order to increase damages. Offense state in declaration wrongs for which he could not maintain an action by breaking and entering the house, and beating wife, servants, or children. I don't suppose the injury such that he loses the company of the wife or service of others. There are to show the aggravating circumstances, with which the trespass was committed, for which action is brought. These facts don't support the issue of guilty at all, but still they are proper to go to the jury because they show the enormity of the trespass. 407.  
Haw. 61. 1 Sid 225. Co. 64. talk 115. 642. 2 Burr 114. Conha 106 180.

It seems well settled that in help quare clausura perit. Offense may join in the beating of wife, servant &c in an action per quod beatitum amist, or conversitum amist; but this is only true where the trespass is a component part of the beating actie where it can be treated as the same transaction. so they can't be joined if committed on different days, for if the trespasses are separate the proper action is trespass on the case, for the loss of service is a more consequential damage. In the former case the beating is the only gist of the action, the beating is a consummation of the act. But if they are on different days, there is no propriety in joining them, one in case the other trespass. 2<sup>o</sup> R 166. 2<sup>o</sup> Ray 132. 6asthew 113.



Trespas to Real Property. Pleadings. 57

Hils 43. 202. Rep D407.

When the acts may be joined in the same declaration, then he if he wishes to recover for loss of service must lay the action with a per quod servitium amisit. Otherwise the pleading is more appropriate. No avoidance of loss of service is admissible, and no recovery can be had for it, unless the loss of service be laid in the declaration.  
Talk 644.

The trespass must be laid to have been committed on some certain day, yet need not be the true day, need not be proved as true, tis immaterial. But tis material universally, if tis necessary to prove according to the truth of the fact as laid, occurs tis immaterial. So if a bond declared on to be dated on the first of may, and it is dated the second day of May, here is a variance - so the time is material. So if trespass - he may prove it to have been committed on any other day, tis immaterial.

In declaring in trespass - time is prima facie not material, but may become material by the plea of Debt, as if Debt should justify trespass on one day, and should assign another on a different day. But 283? Co 832. Ep 407. Co Litt 238. and Aff may join in one declaration several trespasses, or he may sue each of them severally or jointly. Tha 420. 8 to 159. 5 Bac 185. 6.

But said that if it appear on the face of the declaration, that a certain person not joined was a party to the trespass with the Debt,



Heb to Real Reprob. Readings  
the declaration is ill. This appears to be questionable. 111. in  
Saunders consider it not law. 1 Leon 241. Holt 164. 199. 5 Bac 192.  
1 Saund 291. 6 IR 766. This appears destitute of principle, for  
tis clear if tis not on face of declaration, it don't effect the de-  
claration even tho it appears in general evidence under the gen-  
eral issue, or be, pleaded in abatement. It is allowed that Jff may,  
me one if he pleases. 1 Saund 291. 6 IR 766.

Indeed it has always been holden, that if it appear on the face  
of the declaration that the person not sued, who was concerned in  
the trespass with the Dft is unknown to the Jff. Readings are  
good, yet it seems the action appears to be joint as much as in the  
case above. 1 Leon 241. 5 Bac 193.

Yet the Jff may always sue both alone saying nothing of the rest,  
i.e. the plaintiff is to take notice in the declaration of any  
party to the trespass who is not joined as Dft.

Essential at com law that the declaration should charge the trespass  
to have been committed with force and arms, i.e. et armis, and  
contra pacem. These at com law are essential averments of the gist  
of the action - not aided or cured even by verdict. Reason is the  
trespasser is liable to pay a fine to the King, so this must be aver-  
tioned in order to set in the claim of the King, and to authorize a  
capiatur. Whereon if tis not with force the party is only amer-  
ced and the judg<sup>t</sup> is in misericordia. 4 Bac 11. Holt 686. 40. 2 Bac 506.

5 de 191. Earth 66. 390.

3. 283. 196. 1. 1100. 28.

By Stat 16. 17 Car 2. the omission of these words in a declaration may be amended after verdict, the bad or gen<sup>l</sup> demurrer takes 696. Exp. 408.

And now by Stat of Wm. 4. the judg<sup>t</sup> of capiatu<sup>r</sup> pro fine is taken away. It enacts however that instead of said judg<sup>t</sup> the M<sup>y</sup> shall pay 6s by way of fine to the King and shall recover it from the D<sup>ef</sup> by way of costs. 5 Bac 507.

Holt says now since the Stat the words *vi et armis* are not necessary, since both judg<sup>ts</sup> are now in *curia cordis*. This is not law, for no fine is paid unless the act is laid to have been done *vi et armis et contra pacem*. To Hag. 2985. 5 Bac 191. 2. The words are still necessary in Exp<sup>r</sup> to let in the provision of the Stat of W<sup>m</sup> 4. and 5.

In connect it would not seem these words are necessary on principle or matter of substance, for here no fine is paid, judgment is the same in all cases, the judg<sup>t</sup> of capiatu<sup>r</sup> pro fine is unknown to our law. Indeed it was once decided in case of *Brownson vs Phelps* in 1776, that the omission of both sets of words was not ill or special demurrer.

I don't know but the court would now consider them as matter of form. I should think they would be necessary in point of form. In the case of *Bosworth* is a writ of error was prayed out but not executed. and general rule the injury, for which an action is brought must be specially alleged in the declaration i. e. with particularity.

How to Real Property Readings.

One exception namely where the injury arises in trading cases. There is sufficient to state the wrong generally as may be and yet be intelligible. This is to recover in equity on the face of the record. So not bad even in point of price. 150 228. 5 Bac 147.

It is necessary to state in declaration the value of the property for the taking or injury to which the action is brought. This rule applies only to those for property or some thing of the nature of property i.e. a subject of valuation. As if action is for breaking down herbage the value of it is to be stated, but can't state value of an acre or reputation.

It also must generally state the quantity, yet it need not be the precise value or quantity. Indeed in some cases no quantity can be stated, as cattle eating grass, peas &c. for it can't be ascertained. 200 J. 485. The omission of either is aided by verdict for that supplies the value or quantity. 150 39. Exp. 407. 5 Bac 146. Crof. 435. As to forms 20 Ray 113. Hard. 488. 447. That is aided by verdict. Exp. 407. 4 Binn 2455. Crof. 130.

In trespass of a permanent nature where the injury is such as is capable of renewal, or continuity, it is renewed or continued, the Plff may recover by laying the trespass in his declaration with a continuando. Thus if the cattle of one enter on the land of another from day to day, he may lay the injury with a continuando from such a time to such a time, because the acts are so blended that they can't be separated. In these cases the trespasses



are called permanent. 2d Ray 240. Talk 688. 3 Bl 212. 2 Holt 545.

The Mff is not obliged to bring the action in this case with a continuando, tis at his election. 1 Geo 320.

Laying the action with a continuando is not laying it with a continuation. 2d Ray 240. Ray 256.

But where the trespassing acts are such as terminate in themselves, and being once committed cannot be continued, they can't be laid with a continuando, tho' done at different times. Thus cutting trees on different days, for the cutting of one day is distinct from the cutting of another.

So if one should enter on another's land and kill beasts on different days, it would be improper to lay the action with a continuando, for the acts are completely independent, and not continued acts. Thus with heading down the same grass on several days, or consuming the herbage. 2d Ray 239. 975. 3 Bl 212. 1 No 39. Talk 6889.

But in those cases where there are several trespassing acts on different days but which don't in their nature admit of continuation, yet they may be joined, for in one declaration and charged to have been committed on divers days and times between such and such a day. Talk 688. 3 Bl 212. 2d Ray 323. The Mff may recover for the whole in one declaration action laid with a continuando.

2 Holt 545. Ex. Consuming or cutting or heading down grass &c or he may bring a separate action for each day's separate injury. 1 Geo 320.



Rep to Real Property. Winding.

It is to be observed that if several trespasses are charged to have been committed on one day no evidence can be introduced of trespasses which are not committed on one day i.e. on some one day. So he may lay them to have been committed on another.

Do Ray<sup>2</sup> 240. 60p. 408.

There are two modes of declaring with a continuando for the whole time, from such a time till such a time, and this is proper when the trespasses are committed without intermission for a longer time than one day. But when the several acts are not done in continuity but at different times, at intervals, they may be laid with continuandos, not from such a day to such a day, but by continuation, on divers days and divers times from such a day to such a day. Talk 124. 5 Bac 197. 8. Do Ray<sup>2</sup> 240. 3 Ray<sup>2</sup> 396.

But the particular intervening days need not be laid in, is this distinction attended to in practice? E.g. Cattle trespass for several days in succession, again they enter at intervals.

But where there has been an ouster of the possessor and a reentry, here the ouster and all acts done under it may be laid with continuandos for the ouster continues as long as the dispossession. The other acts are incidental to the principal trespass.

And the rule goes further, for if the owner is ousted and then recedes, and is again ousted and then recedes, he may lay the whole with a continuando. Co. E. 182. Do Ray<sup>2</sup> 397. 398. Talk 188.

heppap to Rent Prop. 4

60

Another rule. If after the Pff has been  
sworn and recited he is recited and recited  
again he may then lay with a continuance  
for the whole - this Mr. J. says is not correct -  
for the hypothesis of possession is not  
continued so the rule as laid down in  
author? where. Where the hypothesis consists  
in a disjunctive and hypothesis under that  
disjunctive as well as the profits - he may  
lay with a continuance supposing him  
to have been in possession during the  
whole time but he may set forth the  
particular and a Special state of the  
facts. By the common form after recital  
he is supposed to have been in posses-  
sion by relation - but there is no  
need of this form - ad Ray? 977. 11 ad Aff. 502.

Though these distinctions may be artificial  
and rather to refine - laying infirmity  
with a continuance is radically defective  
and cannot be cured even after a verdict.  
My Declaration should state that Sept-  
killed Pff, house upon a certain day  
and by continuance killed him to another  
day. - Talk 639. 1 Dec. 22. Ch D 408.

On the other hand if some of the papers  
are tainted with a counterclaim which may  
have been done and some that may not  
and with the verdict after entire  
damages, yet the declaration is good.

3 Lev. 94. 1 Sid 375. 2 Ray 239. 1alk 639.

2 Hume 176. That such declaration is  
good upon demurrer is never doubted, for  
if there is any trap laid properly it is  
good - yet the question is whether it can  
be cured by verdict - anata take the  
reverse.

Verdicts on the part of the Def.

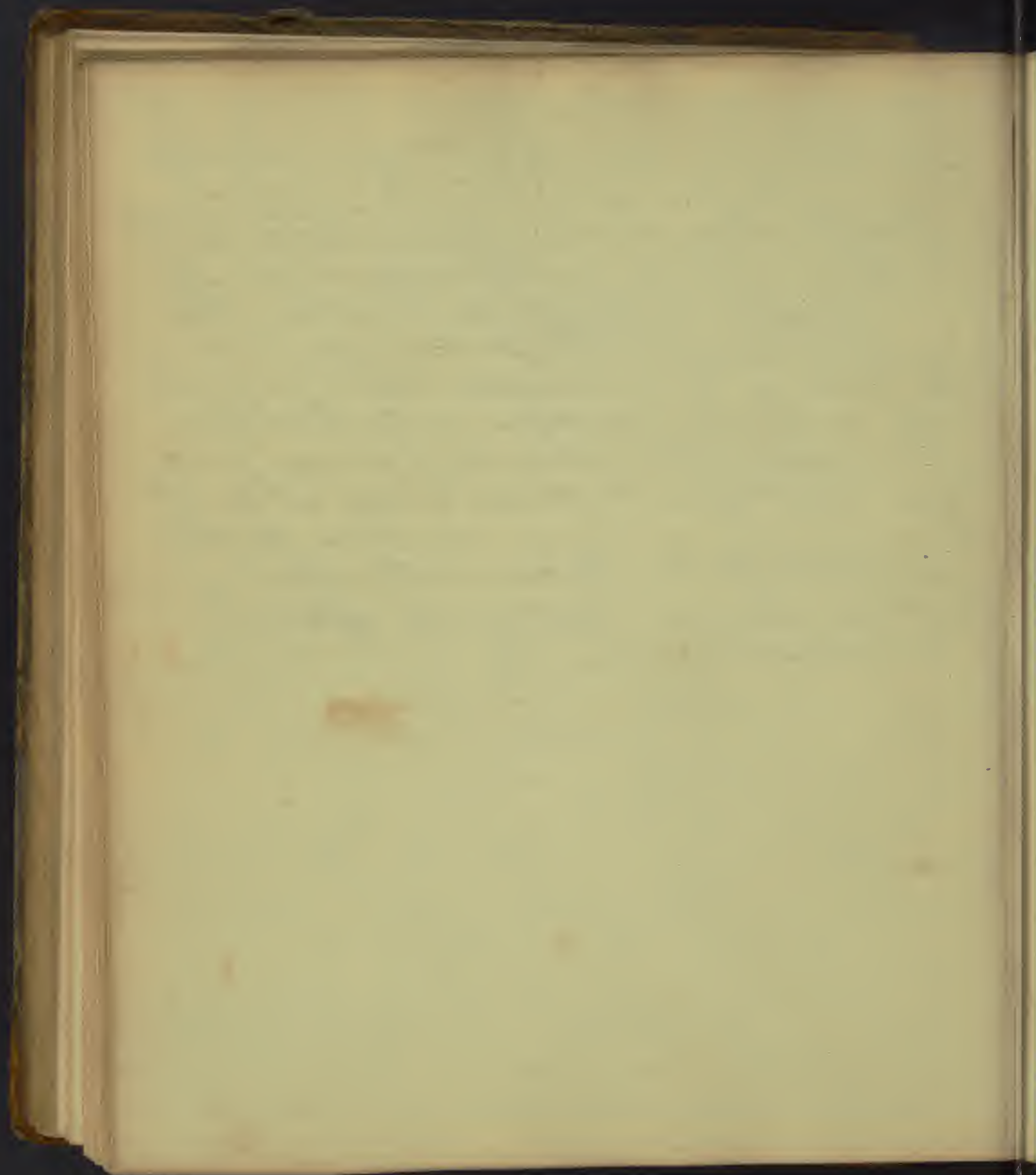
In every action founding in tort -  
the general issue is not guilty. If a  
person is indicted for trespass and con-  
fession and that confession is entered upon  
record - he is forever estopped to plead  
not guilty - to an action of trespass,  
brought on the same wrong. - 2 Hawk 233  
Cp D 411. Where the parties are not the  
same the Deft can prevent that record  
from being given in evidence - reason is  
that his confession is the same as any decla-  
ration in or out of court - verbal dec-  
larations are good yet not conclusive  
but a record is conclusive.

If in an action he had pleaded not guilty and was convicted - this could not be given in evidence ag. him in a civil action.

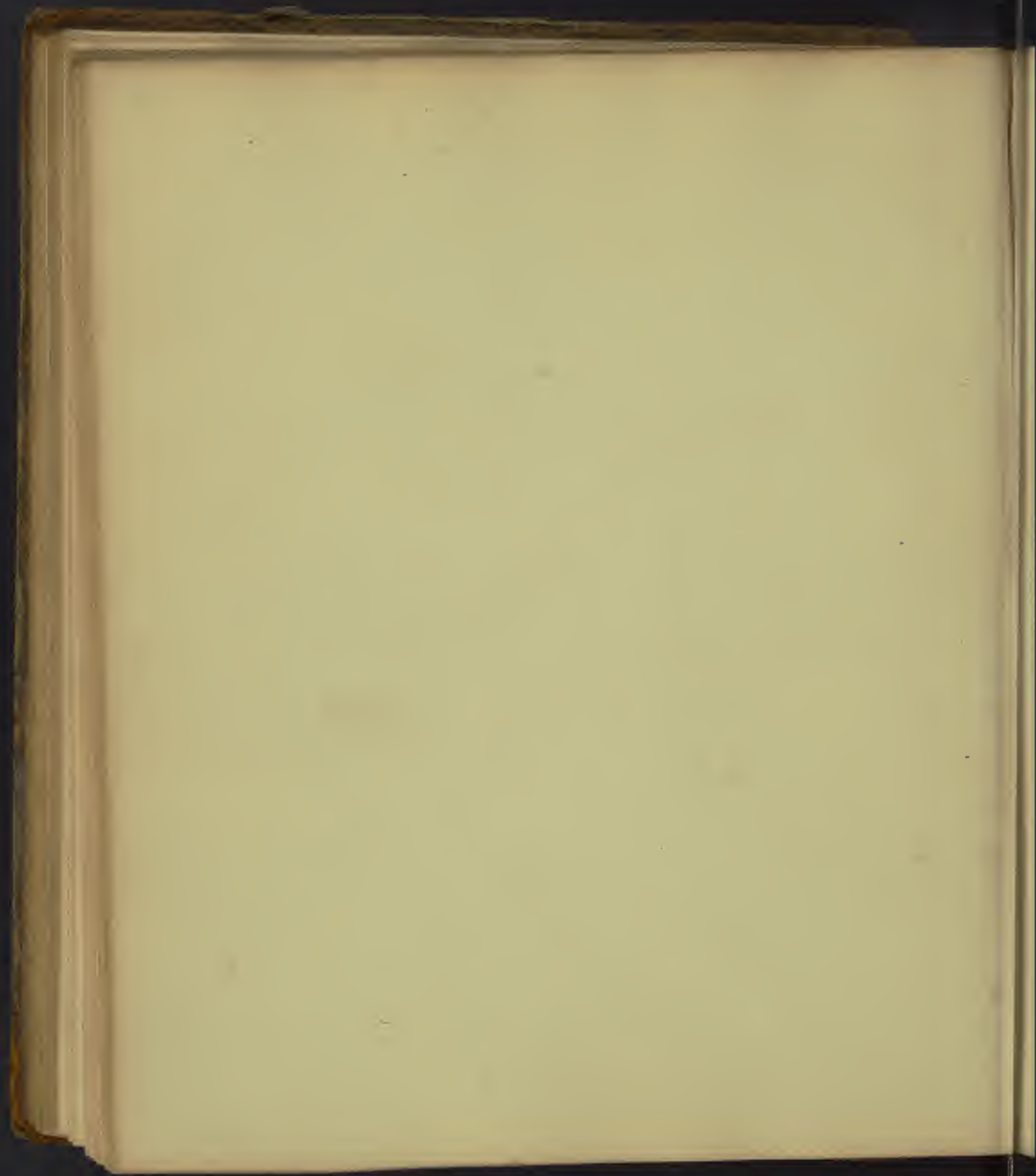
If Deft-retires upon a special justification he must at court law plead it specially and not give it in evidence upon the general issue - for the general issue denies the facts in the indictment but a justification admits the facts but denies the operation of law upon them. Ex. Deft pleads genl issue - and justifies that he entered as Bailiff this evidence contradicts the plea. He should admit the facts yet avoid the effects of the law. 12th Co. 12d Ray 732. Talk 287.

In Court the law of



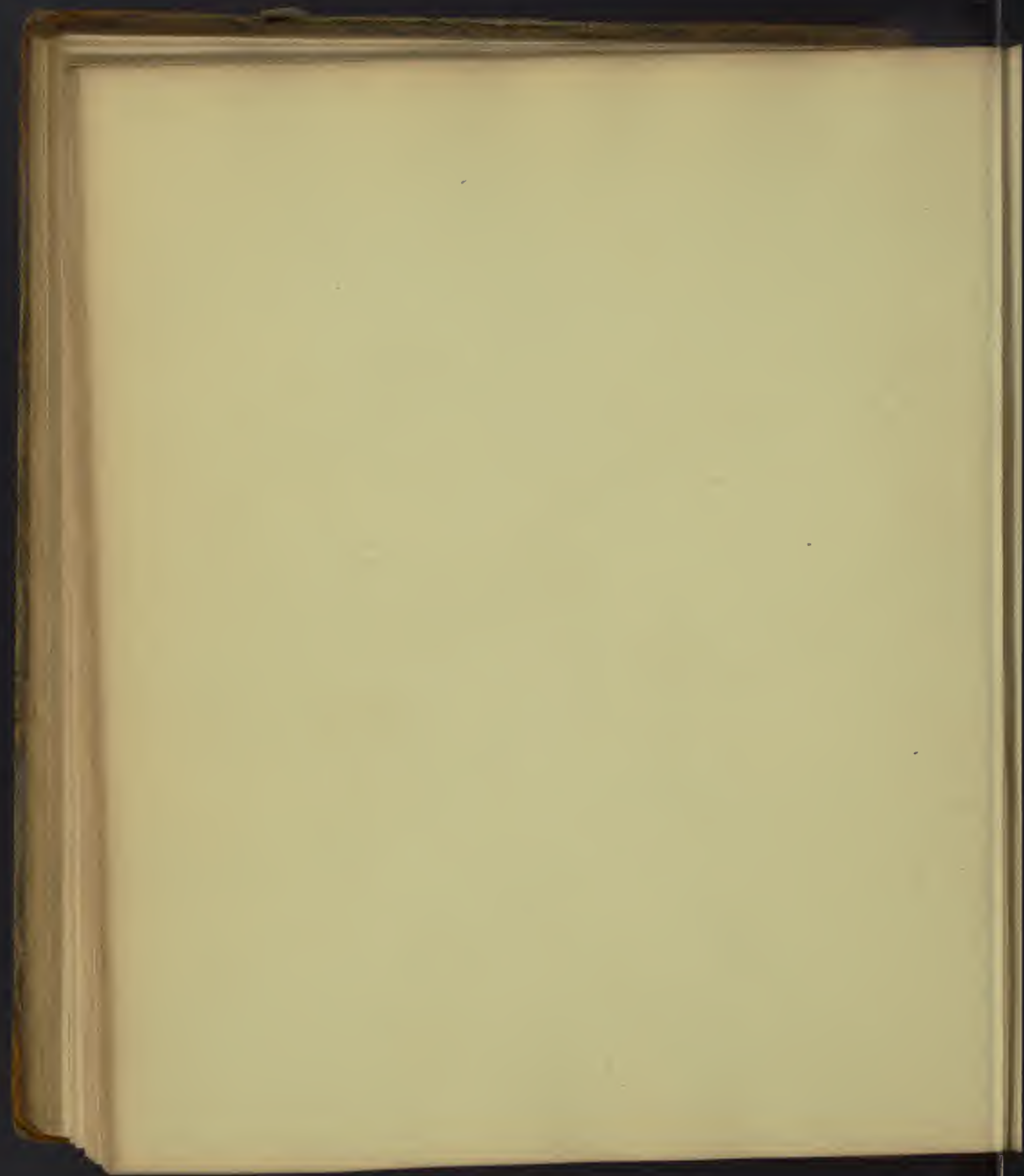




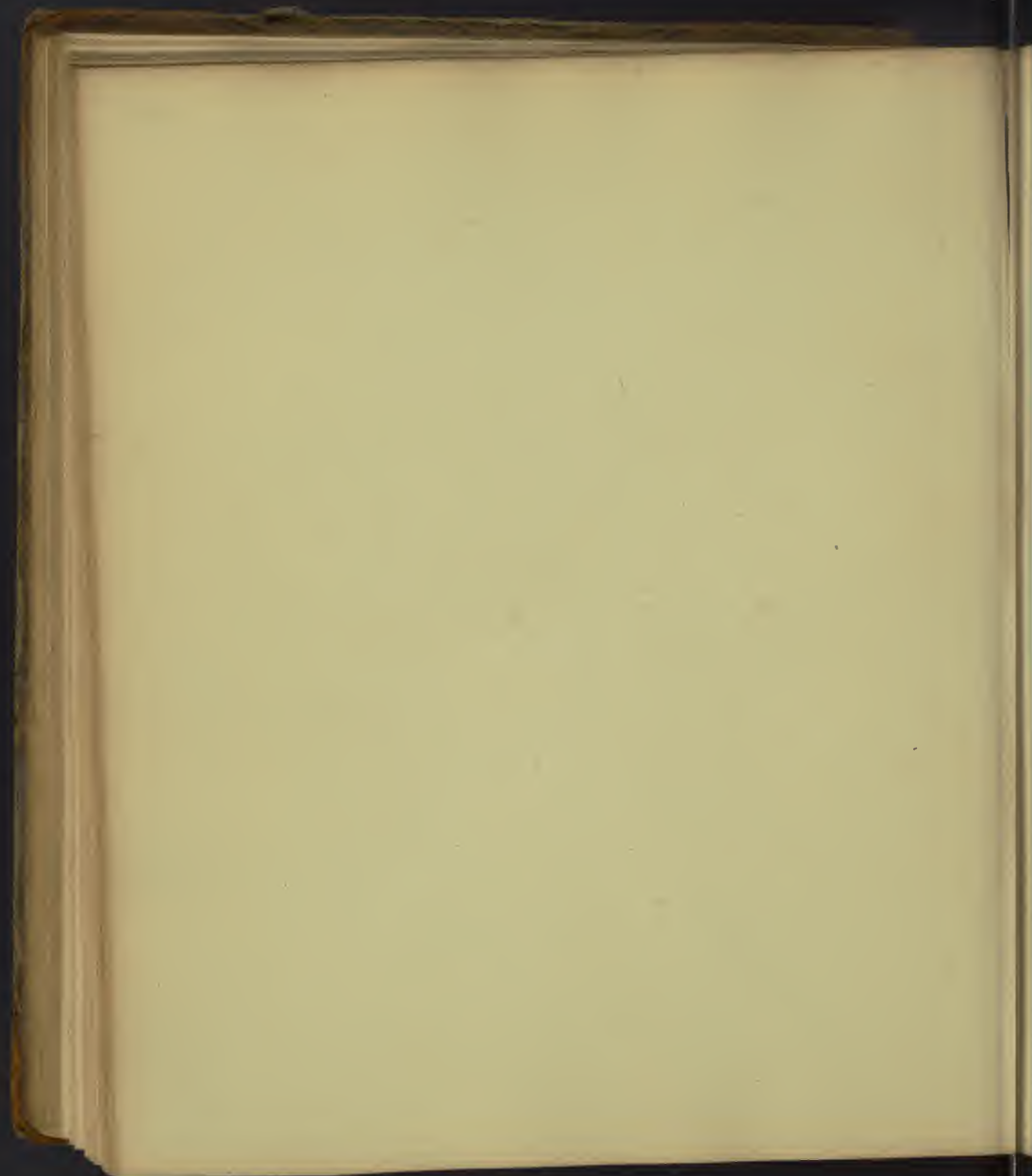






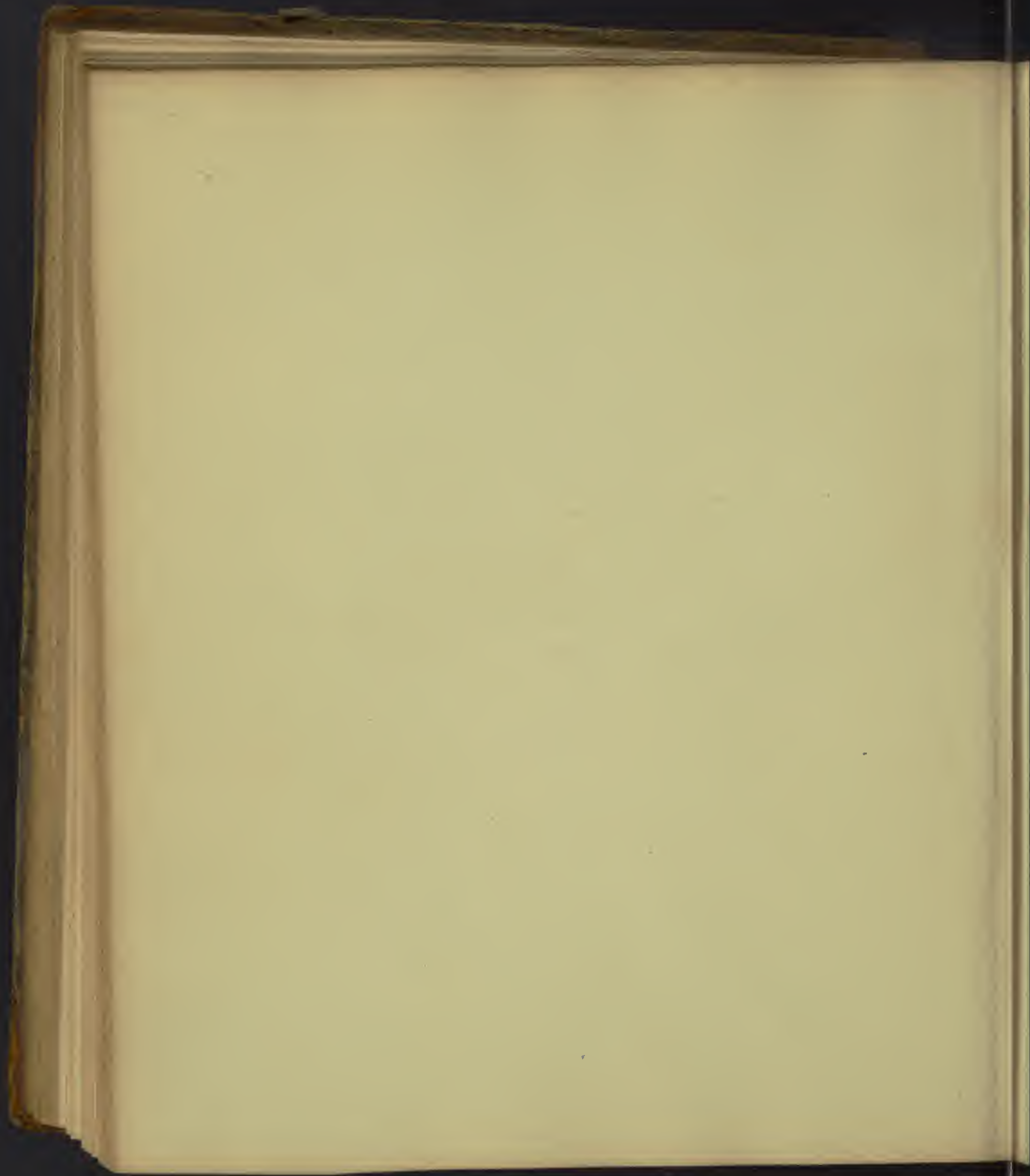




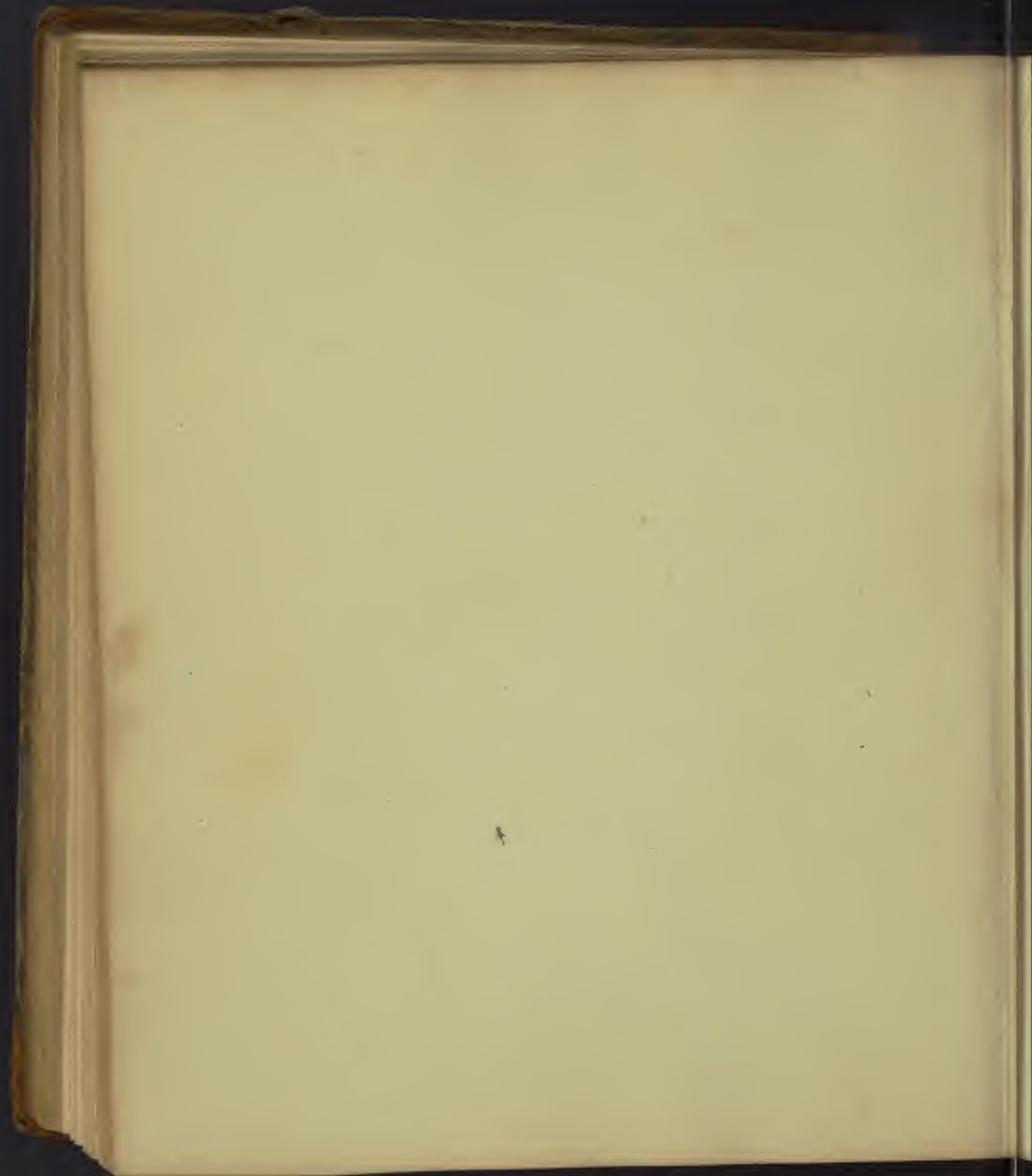












# 67 Mercantile Law

## of Bills of Exchange.

Some distinctions between mercantile, and common law.

Mercantile law is not a custom, it obtains in all commercial countries. It is then the common law operating on mercantile transactions, not confined to merchants. So a mechanic may draw a bill of exchange.

There are local wages with respect to mercantile law. It is not necessary to plead law merchant. So not a custom. The form is according to custom of merchants, but need not be proved, whereas a custom is proved, so we have prove the law of other States.

Wages of mercantile law are provable.

Bills of Exchange, Promissory notes, Insurance, Charter parties, Contracts of ship owners and masters, Law of mariners, of Portage, are subjects of mercantile law.

Some points of difference between mercantile law and Com law.

At Com law no instrument, or bond can be assigned. So that action can be brought in assignee's name - no property vests. To be sure the indorserment of assignor contains a promise not to discharge the obligation, nor impede the collection of it, yet he may do it and subject himself on promise, or if under seal, to an action on covenant. Reason of this rule was, rich and



Mercantile law.

powerful men brought law suits, and that was a crime called maintenance.

But for the benefit of mercantile concerns bonds may be assigned.

Chan.<sup>4</sup> have however undertaken to protect the assignment of bonds, and if discharged, equity will compel them to be paid again. i.e. a bill will lie for his fraudulently receiving the discharge, and we allow an action at law. So in this way bonds are assigned.

But the mercantile law allows the indorser to be an absolute sale of the property in the note or bill of exchange. This assignable quality is peculiar to mercantile law.

Exception in case of warranty that runs with the land. This is the only instance of a bond being assigned at common law.

So mercantile law allows a joint where there is no privity of contract.

Another very material difference is that in Equity a bond passes to the assignee with all the Equity it has. So if there is equitable ground why the obligor should not pay the assignor - he need not pay the assignee - E.g. Bond obtained by fraud or duress, or on illegal consideration.

But by mercantile law the rule is different, for here the assignment of mercantile instruments is cherished, for after a bill is negotiated, the bona fide holder must recover, except in two cases, which are by force of the words of the Statute viz.

Gambling notes, and usurious notes. The Stat says that such contracts shall be void to all intents and purposes.

At common law you can enquire into the consideration of a note. In mercantile instruments you cannot go into the consideration at all - after negotiation - it's same as if sealed. Reason is if the rule were otherwise all confidence would be destroyed. But it may be gone into as between the parties.

The rule as to specialties arose from a technical idea, seems with respect to bills of Exchange.

Again at com law, obligation must be founded on privity of contract, or on prior moral duty. E.g. A supplies B's wife with necessaries, on B's refusing.

So at com law if one pays another's debt, yet no action lies.

But by mercantile law, if one pays money for another without request, action lies. E.g. acceptance for the honor of drawer - whereas a voluntary currey never subjects at com law. as if one repays for another voluntarily.

By mercantile law acceptance binds, tho the drawer did not owe the drawer - yet this is promise to pay the debt of another, and may be by parol.

Another difference is this, at com law if there are two joint debtors, and both are imprisoned - now if one is discharged the other is ipso facto liberated. In the said his being discharged is

Mercantile law:

presumption that the debt was paid and this presumption cannot be rebutted.

Anciently the body was a temporary payment - this is established law in Eng. If the Sheriff was guilty of a voluntary escape, it was discharge and this was transferred to the creditor. But improperly, for Sheriff was guilty of a wrong.

But by mercantile law all debtors may be sued and imprisoned in succession.

Again, at Com law there is survivorship in all cases of joint-ownership of personal chattels, except instruments of husbandry.

But by law merchant there is no survivorship. E.g. One of two joint partners dies, the partnership is dissolved, but the property is held by Executor of deceased and survivor, in common, yet the survivor is to sue and be sued alone. This survives. If he recovers he is to account.

In general it is not true that promises, by mercantile law, made without consideration are good, yet there are some cases in which this is true.

Again by mercantile law goods may be sold in transitu. Scas at Com law. E.g. Property sold to a Bankrupt on 6 months credit - the property passes at Com law, and the vendor is on the same footing with other creditors. But by mercantile law he can stop them immediately for benefit of Commerce.

again if some property at sea is thrown overboard, to save the rest all must make contribution. E.g. Horses thrown over to save riches. Runs at common law.

So also if a ship is lost and the goods saved, the latter is equalized. So the mariners lose their wages.

"Months" in mercantile law mean solar months, by com law it means lunar months.

A contract cannot be performed on the Sabbath, for in law tis not regarded as a day, So said Finch Dies Dominicus non est juridicus.

So at com law if money is due on Sunday, Monday is the pay-day, but by mercantile law, Saturday is the day. If the second day of grace is Christmas and Sunday there must payment be on Friday.

At com law tis no matter how notice is given. But by mercantile law it must be by protest E.g. Drawer cannot be subjected to indorse, tho he have other notice.

At com law if a horse is stolen and sold no title is claimed. To be sure tis otherwise with money or any currency. So if Bailment is of such a nature as to deceive and lose my title E.g. I have lent to go to Georgia, tis sold and the title is lost. Here if only lent to go to India. But finder of a bill gains an absolute title to cash &c.

A bill of Exchange is an apen letter of request from one man to another containing a desire to have a sum of money paid to a third person on the writers account.



### Merchable law. Bills of Exchange.

Usually is to be paid to him in whose favour it is drawn or order. Sometimes it is directed to be paid to bearer. In the latter case it is transferred without indorsement i.e. by delivery.

The writer of the letter is called the drawer, the person to whom it is written the drawee, or after he accepts the bill the acceptor, and the person in whose favour the bill is drawn is called the payee, or after he, or a person endorses it he is called the Indorser and the transferee is called the Indorsee.

"Usance" means the time of payment which usage has fixed in different countries. To "pay at usance" is to "pay at that time" pay at half usance is pay at the expiration of half that time.

"Days of grace" are the time which is allowed over and above that which is fixed for payment. In Eng<sup>d</sup> and in this country they are three, but different in different countries.

"Promissory notes" are negotiable. It has lately been a question whether "order" was necessary to make it negotiable. The word "order" makes it negotiable I think.

Two persons are concerned in making this note, the Promisor or maker and the Promisee. The maker of the note is sometimes called in the books the Drawer, but improperly, for he stands in the place of acceptor of a Bill of Exchange - not in that of Drawer.

The Promisee of a note is in the place of the payee of a bill of Exchange.

Indorse of a note is in the same predicament as the Indorser of

a bill of Exchange. Indorsement transfers the power to receive the money and the right of action.

The indorsement may be and commonly is in blank i.e. the payee merely sets his name upon it. This enables the holder to fill it up to himself and then bring the action against the maker, or he may sell it without filling it up and then the vendee may fill it up, and may bring an action against any one whose name is on the bill against his immediate transfer - the action in the last case being founded on the privity of contract - any indorser may be sued, even tho' the bill has not been accepted.

Every indorser is a security to the subsequent holder - after a bill is indorsed it passes by delivery.

The Drawer contracts impliedly for several things - 1<sup>st</sup> That the drawee or his agent shall be at home. 2<sup>dly</sup> That he shall accept the bill. So if he does not the Drawer is immediately liable. 3<sup>dly</sup> That he shall pay the Bill - and every Indorser makes the same contract.

The Payee impliedly contracts that he will use due diligence in presenting the bill, and also that he will give particular notice of refusal by protest. If he does not why he has no remedy against him. In short he must give notice to all whom he intends shall be liable.

The object or reason of giving notice in case of refusal is to

Mercantile law.

afford an opportunity to drawer to secure the effects of drawee if he has any in his possession, or in case of indorse the object is to allow him a remedy against previous indorsers or drawer.

Then bills are convenient means of transmitting money. Frequently these bills are mere accommodation bills.

Often <sup>4</sup> persons are concerned in a bill of Exchange but usually only 3. E.g. A in London owes B in New York and D in New York owes C in London. Now A wishing to pay his debt, pays the money to C and C draws a bill of Exchange on D requesting him to pay so much money to B. Thus the matter is settled.

In some cases there may be only 2 persons concerned in a Bill, as in a note and this is more frequent than formerly. E.g. A owes B to pay £, and B accepts it and then indorses to C. Becomes 450. Walt 30. 6 mod 29.

This bill may be made payable at sight, or days after date, or at demand, or at date.

Disputed at our law if payable from the date, formerly held to include the day of the date but from the day of the date, excluded the day. I think both mean the same. It is a distinction without a difference.

2d Mansfield says it shall exclude the day or not, according as it gives effect to the intention of the parties.

But by Mercantile law the day is always excluded. 2 Ray 281  
Mange 829.

In Europe old and new styles are still in use - difference is 11 days. new preceides. If payable in a month it means that which would be a month where drawn, not where tis to be paid. so of file.

Bills payable at sight have no days of grace. Beaws 484.

There are two kinds of bills of exchange - Foreign and Inland. mercantile law has nothing to do with the latter, independent of Statute, which have put both on the same footing. In United States a bill drawn by Inhabitant of one State on inhabitant of another is foreign.

of Foreign Bills a number of sets are usually drawn - the first in the common form, the second of same date is pay if first is not paid. and so of others.

These bills if the first has been paid are of no use, yet they may be made a means of providing, as they were in this country in our revolution when drawn on France.

It seems to have been a received opinion that a note thus "I promise to pay to A or order" was not negotiable. Stat. have made them so. J. Reece thinks they were negotiable in themselves at Com law, as Mr. Shipman of Vermont clearly demonstrated. This is an important question in States where there is no Stat as in Connec.

"To order" means the person whom he appoints. But said that this is a promise to a person not yet appointed i.e. to a



*Macaulay's law.*

*person in nubibus*. to nobody. But in an analogous case a person so situated may bring the action.

I know this said the promise is made to the immediate promisee. Suppose B promises A to deliver money to C which A delivers to B here C may sue B on that promise.

So on covenant of warranty to a man and his heirs, and assigns. The heir or assignee may sue. The truth is the assignee vests the right of action in the assignee. There are exactly analogous cases. *Waltk 129. De Ray 757.*

So if J. on death bed being about to dispose of a farm, to raise a portion for a daughter - the son promises to pay the portion if he will not sell the land. Now the son is Executor yet the daughter may bring an action on this promise soons she is *remediable*.

I think it negotiable at com. law, it occasions no infringement of principle in any respect.

*Who may draw Bills of Exchange.*

Formerly thought to be peculiar to merchants soons now.

Now any person concerned in mercantile transactions may draw such bills. *Earth 82. 2 Vent 292. 1 Row 125. or 185. 2 Do 501 or 5.*

General rule now is any person who can make other contracts, may draw Bills of Exchange.

But the Infants may contract for necessaries, and not in general for other things, yet they cannot draw a bill of Exchange. What are necessaries? 1<sup>st</sup> meat, drink, lodging, clothing &c.

Then must be necessary for that particular infant in his then present circumstances. So if he has a parent who is kind nothing is necessary. In all these cases he is only bound to the amount of the value of necessaries to him.

But you can never look into the consideration of a bill of Exchange. So an infant cannot bind himself by Bill of Exchange even for necessaries, not even tho' expressed in the bill to be for necessaries for him, not knowing whether necessary for him or not. 1 Ser 56. 19 R 40.

The consideration of a note before indorsed can be augmented into some with a bill of Exchange except as between the Drawer and Payee, and as between the Drawee and Drawee. If an infant draws a bill of Exchange, and a person of full age indorses it, that person is bound.

As to Married women. They can bind themselves by Bill of Exchange in those cases in which they can make other contracts.

It is questioned in Eng whether a married woman living separate from her husband on articles of agreement, and on separate maintenance can draw a bill of Exchange. All agree

Maritime Law.

that she may contract if her husband is banished the nation. So this proves that she has a will and existence. I know he said the husband is civileiter mortuus.

So also may she if the husband has attained the nation, or is transported for 7 years. The only grounds of disability of wife are 1<sup>st</sup> danger of infringing his marital rights or 2<sup>d</sup> danger of her being coerced. But in the case before us he has abandoned all rights to her person and this covenant is allowed to be valid by a covenant to relinquish his right to her real property he is bound. But said that Mansfield relied on separate allowances, But Tanquer, he made her liable generally on all contracts. Co Litt 132. 19 R. 4. 2 Bl R 497.

The maker of a note stands on the same footing as the acceptor of a bill of Exchange. 2 Burr 676.

The indorser of a note is the same as the drawer of a bill of Exchange. A note payable "to order of A" Court said "was the same as if to A or order." 10 Mod 286. 1 New S.

Difference of opinion when to "pay the bearer" whether to indorse. So as to subject all indorsers and make them liable just as if to "A or order." 2 New S. - this goes to the point that the drawer is liable. 3 Lev 299. 1 Salt 125. 1 Lord Ray. 180.

4 An action lay, by Com law, but not by the Merchable law. The  
 - drawer could always sue his immediate indorser at Com law on  
 the ground of breach of contract. But he was jettied that "to bearer"  
 has all the qualities of Bill of Exchange. Indeed it has more, for  
 it passes by delivery in the first instance. 1 Bl R 437. 3 Burr 1516.

A person who comes unfairly to an instrument of this kind cannot ac-  
 - maintain an action on it. 1 Burr 482.

Whatever is a currency and bona fide received, is lost to the owner  
 when stolen, and the property is transferred to bona fide receiver.  
 This has been extended to Bills of Exchange. 1 Burr 459.

Now consider the privileges of Bills and notes.

General principle. That in all contracts at Com law unless sealed  
 or bonds, the consideration may be enquired into. On a bond &c you  
 may enquire whether the consideration is illegal i.e. as to its  
 nature, but not whether there is any consideration at all, for  
 the law presumes one.

The privileges of a bill of Exchange are the same as those  
 of a bond and even greater, for after negotiation its benefit  
 cannot be enquired into.

Notes of hand may be enquired into as to the consideration, be-  
 - fore negotiation, not after. 3 Burr 1639, 1669. 1 Bl R 445. Loe Ray 758.  
 2 B 6389. Co Litt 214. 13 R 26. do 619.



Mercantile law.

To constitute a good Bill of Exchange it must have certain qualities. 3 wils 213. I don't mean that it is not a good contract at common law, as between the parties without these qualities.

The 1<sup>st</sup> requisite is, it must always be a request to pay money.

2 Strange 127. Bel. 273.

2<sup>d</sup> The credit must be founded on a general personal fund, and not confined to any particular fund. E.g. A draws a Bill of Exchange on B in favour of C to be paid out of his growing substance. No authority to pay only out of this fund - not a good Bill.

1 C. and 294. Do. 316.

To a bill directed to be paid out of the money belonging to the Proprietors of the Dismal Swamp mines - not good. 1 Wils. 209. 2 Strange 1361.

To pay so much money out of Mr. Munt's money as soon as you receive it - not good. 3 wils 207.

To pay so much money on account of, freight - same principle. 2 Strange 1211. Doug. Pinson vs Dunlop.

Altho a particular fund should happen to be mentioned, yet if the personal credit is general it's good Bill.

This doctrine has never been applied to notes of hand, but there are cases to the contrary - a man's particular credit is bound by a note of hand and that only as agreed. 20th Reg 1545.

A third requisite is, the bill must be payable at all events - not

depending on any contingency - E.g. Pay so much money out of my 5<sup>th</sup> payment when due - here too uncertain whether it will ever become due - but is bad on another ground, for is out of a particular fund. 2<sup>d</sup> Ray? 1569.

To pay so much money provided certain terms mentioned in a letter are complied with. Does not. Court said not good, even tho the terms had been complied with, for it was not good at first; & so cannot be set up. To pay so much out of Mr. Stuart's money when received - bad on two accounts. 2<sup>d</sup> Ray? 1362. 1396.

For a note to B or order, if B don't pay it, not good. 3<sup>d</sup> Ray? 368

For a note to pay so much money if J. Stiles leaves him so much, not good. 1 Burr? 323.

No matter about the uncertainty of time of payment if time must come. 2 Strange 1277.

Said a moral certainty is sufficient. Moral certainty don't apply where we should think - tis a principle of policy as I apprehend. Suppose a note given to pay when the richest man in the County happens to die - how he may become a bankrupt or be a cheat, so not good.

But acceptance to pay when a certain public ship is paid off, or in a certain time after is good - here the rule applies, for here is a moral certainty. Government have pledged themselves. The truth is those are cases in which the public is concerned, and the rule is founded

Mercantile Law.

on policy. 1 Change 24.

If the Ship concerned is not a public one, I presume there would be no moral certainty &c. Ships belonging to East India company, yet they are as liable as Government to pay. 1 Wils 262.

This moral certainty is confined within narrow limits.

Bill of Exchange requires no technical words, but any words that convey the idea to pay money, with the other requisites are good. To please to deliver is good. So deliver to B or order - good. So to account for 50 dolrs to B or order. disputed - but Court held it the same as a promise to pay 50 dolrs. 1 Change 629. 2 D. Ray 1396.  
3 Mod 264.

Are the words "value received" necessary in a bill of Exchange? Formerly they were - now more than 1212. Contra 1 Mace 5. 2 D. Ray 1556. & Hardie Rep 25. is decided not necessary - ground of decision in that case is that Bill of Exchange is a sealed instrument.

But how is it with notes of hand? Why I suppose it would turn the burden of proof on the promisor. But as between the parties promisor and promisee - "to B or order" not better than to B. This is all the operation it ever has. The words being inserted render it prima facie evident that there was consideration.

& the word "order" essential in Bill of Exchange as between Drawee and payee of Bill of Exchange - it turns proof on Drawee I know of no decision of this point. 2 Change 1212. 3 Wils 212. 2 D. 353.

5

So much however is true, long usage would lead us to conclude this to be the original idea, that the words "or order" are essential to note of hand to make it negotiable, and present practice so leads authorities *supra*.

In *Slack v. 288*. decided not necessary to have those words. But I think they are from practice.

### Of acceptance of Bill.

An acceptance of a bill is an engagement to pay it, and the acceptor is bound. If he don't pay it the Drawer and every indorser is liable. Common mode of acceptance is by writing on the back, so "accept" - "seen" any thing but negative words. So "except" sufficient - attributed to bad spelling.

Acceptance may be by parol as well as by writing, only the proof is different. So it may be by any collateral writing, as a letter. *1st* 648. *3 Burr* 1648.

A promise that a man will accept is good, tho' the bill is not yet drawn, so if it is drawn, and he refuses, and he then says return it and I will accept - this is a present promise to pay. *Id* 75.

The acceptance of a bill is usually made between the time of issuing, and the time of payment. But an agreement to accept is acceptance. So may be before bill drawn. *3 Burr* 1663. *10th* 777.

If presented after time limited for payment is out. Drawee may then accept it, and even if the acceptance is to pay according to the



Mercantile Law.

tenor - yet in good. 10th 129. 1st and 2nd Arguement 364. 574.

A person may accept for the honor of Drawer, as where the Drawer is absent - or refuses to accept. This acceptance binds as much as Drawer's would have bound him. It however affords no presumption of effects in the hands of acceptor. Beaver 456. 458.

Of the acceptors engagement.

This in fact a contract made personally with the holder, but yet it implies in it an engagement to pay all prior and subsequent holders. It amounts to this "I accept this bill to pay the contents of it to any holder" whatever.

If acceptance is made beforehand it must be to the Drawer, and if he has no effects it is not binding, it is a medium factum unless there are such circumstances accompanying the transaction as would induce third persons to take it. See medium factum.

Its being in writing or verbal makes no difference. Indeed this tendency to deceive don't bind him to Drawer but to all other persons.

If there is no other evidence than Drawer's in mercantile law a medium factum in every case. Comp 572. 574. 10th 775. Long Maxson vs Hunt. True, does not - this reach all persons except Drawer.

Any words "I accept," "accepted," "seen," "concluded with" mean according to the tenor of it.

If acceptance is different from the tenor, it is good to the extent of the acceptance and if paid it operates as a discharge pro tanto to the indorser and drawer. E.g. Acceptance to pay £700 instead of

£1000 - notice must be given of the acceptor being partial.  
1 Sta 214.

So it may be to pay at a different place from that in the bill Stanes.  
481. An alteration in the bill by the Promisor or acceptor will  
not avoid it in some cases, tho as a general rule cannot. Does render  
it void.

If a man accepts a bill to pay at another man's store, from  
another hand. Now if the holder don't go to the store & demand,  
and in the mean time the man fails, the holder is the loser.  
2 Sta 1195.

acceptance to pay half money, and half some thing else, binds.  
Act P 271.

So acceptance may be conditional. But in all these cases there  
must be a protest. 2 Sta 1152.

So I accept if I sell the cargo of such a ship for cash. 2 Sto 59.

It has been a question what is absolute, and what is conditional ac-  
ceptance. 1 Sta 648. 14 R 182.

If the acceptance is in writing a parol condition is void, for  
parol proof shall not contradict written. A parol condition is  
never good at com law where the instrument is in writing. Law 571.

If the acceptor is conditional and that is complied with, the ac-  
ceptance becomes absolute.

What shall be an acceptance is matter of dispute. If the  
acceptor says leave the bill till tomorrow and I will accept this is  
absolute and binding. seems if he says leave the bill and I will

Mercantile Law.

took over my accounts and accept it accordingly. Gibb. L. 6118.  
3 Bosc 614 Bosc 455.

Any thing on the back of the bill of Exchange but refusal, is acceptance. E.g. "See." looked at &c. I suppose however the words must import an acceptance, not to the point.

If Drawee writes to A to pay that bill it is an acceptance tho A decline paying it. Bosc. P. 270.

But if Drawee is referred to A for satisfaction, and Drawee draws a bill on A to know whether he will accept. This is not acceptance of the original Bill. 12 R. 269.

Now notice a case of great celebrity in 3 Bosc 1663. which is peculiar and very important on this branch of the subject. The case was, A wanting to draw a bill in favour of B on C, wrote to C to know if he would accept and promising to give C bills on a house in London. C answered in the affirmative and paid the money. Afterwards C wrote to the house in London to know if they would accept a bill of Exchange and charge it over to A, the house wrote that they would, but before drawn A failed and then the house refused to accept the bill C sued the house, and the argument was that this was a quid pro facto. They said the money was paid beforehand, and so it did not induce the payment of the money. But the court said, it held C into pecuniary, and so he must recover.

on our law principles indeed this propriety of

Third persons being injured is no consideration under mercantile law.

Ashurst says, a contract being in writing is good without consideration. This idea is not law.

### Of the transfer of bills.

If payable to Bearer, or to B or Bearer, it is transferable by delivery.

13 C. 185. 3 B. 1526.

Yet in this case B may indorse it. If payable to B or order, there must be an order to our indorsement before it passes by delivery.

Indorsements are of two kinds, Blank indorsements and Full. A full indorsement is an order to pay some particular person. A blank indorsement is where the name only is put on the back, and the holder may fill it up as he pleases. He may fill it up with power of attorney, or make it payable to himself. Day 611.

After indorsed blank it is transferred by delivery, yet it may be indorsed over as payable to B, and then it can go no further without indorsement.

In case of transfer by delivery no one is liable except the immediate transferee, and he is liable on Com law principles, there being privity of contract. But by mercantile law the holder may sue any one who has held it.

If this were matter of accommodation, he cannot be sued at Com law. An indorsement in blank may be filled up at any time after the bill has issued. 1 D. Ray 575. 1 New 288.



Negotiable Instr.

A man may indorse a note blank and then he becomes liable to any amount that it may be filled up.

Suppl 15 Langstaff in Langstaff.

By Negotiable law you are only indorser. 1 Doby 112. 1 Walk 123.  
35 R 57.

This acceptance may be conditional as in traffic, or only a power of attorney to receive money. 1 Walk 125. 2 Doby 511. 1 How 163.

There is a case when however, bought and sustained for a bill which had been stolen and then transferred bona fide, and when it came to the Bank the Clerk being ordered, stopped it and put it in his pocket. 1 Walk 136.

When a bill is once rendered negotiable, the nature of it is such that it cannot be limited on an indorser, so as to restrain its negotiability. 2 Burr 1226.

A drew a bill in favour of B or C, who accepted it, it was indorsed to D without the word order and then to E, and he said it held by the Court that word "order" was not necessary. D & Mansfield in this case admitted proof of usage - but this was wrong and D & Mansfield afterwards said so.

Now in the 1 Strange 557 where the same principle is adopted. Indorser's indorsement may be restrictive - or as totally to destroy its negotiability - but the restrictive words must appear on the face of the indorsement. E.g. Pay the within to D for my use, here is no transfer. So if he says credit the amount of the bill. This stops it.

entirely. Doug 2 Editt<sup>h</sup> 639. 1 Editt<sup>h</sup> 715.

If in this case indorsement is forged, yet bona fide holder cannot recover of a acceptor, for he should have examined the bill.

Case of Infants.

An infant is never liable for an indorsement. Whether the act of an infant is void or voidable is a question. I think there is no such thing as a void act. If it were void then the indorsee would receive no power by it, but he may sue the acceptor.

When a bill once passed by delivery the holder may recover, no matter how he came by it. 1 Burr 452.

3 Burr 1560. Peacock vs. Stiles. in Doug.

If one of two payees who are in partnership indorse to good both are bound. But if they are joint payees who are not partners both must indorse or only he who indorses is bound.

A and B draw a bill payable to themselves, and one indorses it. I should think it would bind both, because the transaction holds them out as partners. But the court in another case held otherwise. Ladrie vs. Victory in Doug.

So if the situation of the person is altered as if married, the husband may indorse. 1 Strange 516.

They who put their names on a bill are only liable. 2 Burr 1225.

1 Campb 159.

If Executors indorse they cannot do it as Executors, they

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may take a bill as Executor. 19 & 457. 10 mod 315.

It has been a question whether by mercantile law, the payee can be trustee for another - held that he can, and the action on our law principles must be by him who has the legal title, yet held that in some cases certainly one may bring the action when the trustee i.e. the legal proprietor cannot. +

As in case of Executor who was liable on a promise to testator in favour of his son - here the son may sue the Executor ex-acceptate rei, otherwise justice would fail. Carth 5. 2 East 309. 2 Moore 509.

A bill can never be indorsed part to one and part to another, for otherwise the parties would be liable to a multiplicity of lawsuits. Carth 466.

Of the engagements of the parties.

All the engagements of Drawer, Drawee and Payee are conditional, on the ground of each doing his duty.

Drawer engages to the Payee and every holder that the bill shall be accepted according to the tenor of it and also to pay it.

He engages for the acceptor's responsibility, that he or his agent is to be found at the place specified. If any of these fail he is liable to an action immediately and the acceptor's afterwards paying it is no defence. It entitles damages. Beanes 489.

A bill signed blank and delivered to the payee carries with

Authority to draw or file it up for any sum, and the person who signed it is holder. 1 Hen. 4 213.

The duty of the holder is to give notice of non-acceptance, or non-payment. The object of this is to give Drawer opportunity to withdraw his effects, and in case of an indorsement to give to give opportunity to go back on the drawer or prior indorser. If no notice is given and insolvency happens, holder loses it.

The idea is not that when notice is given the debt commences, the debt has never been paid, the drawer is debtor before. So this debt can be proved under a commission of Bankruptcy and this proves it was the old debt. 3 Wils 16.

Indorser's liability was the same as that of drawers except he can resort to Drawer, and his engagements are the same as those of Drawer. 1 Holt 133, 2 Hen 441. de 494.

Nothing can discharge the drawer and indorser except actual payment of the money by some one. So judgment against one is no bar to an action against another but payment is.

So he may bring action against all indorsers at a time. This was a litigious point but was settled. I think the decision was on common law principles, for if a man has a number of securities he may sue on either e.g. joint and several bonds, one judgment is no bar.

The case of bills is different. In the first place this case of the bill of



Maritime Law.

Exchange was compared to that of torts, for in torts a judgment against one is a bar to another action.

But in contracts it never was a bar, for in torts the damages are uncertain, but in contracts they are certain, and this distinction is founded on policy in order to prevent litigation. 3 mod 36.  
2 Howes 441.

But the great argument contended for in this case was this, that there is a rule of law that where a man has two remedies and elects one of them he cannot then resort to the other. But this is a case where there are two and several distinct contracts and one remedy.

The rule applies to such cases as these, as where you may bring either trespass or trover for the same injury, if you elect one you cannot resort to the other.

So where you may distrain or bring an action of trespass for damage feasant, you cannot have but one remedy.

Suppose a man has actually taken out Execution on one of these contracts and puts the debtor in jail, he cannot then sue another for the same debt for imprisonment is a partial satisfaction for the debt. But by the civil law if the man lets the prisoner out of jail the debt is discharged of course, but by the maritime law a creditor may liberate a man from jail and then sue another who is equally liable, as the case of two or more incenses, one may be liberated from prison and the other may then be sued. 2 Bld R 1255.

When the holder presents the bill for acceptance and the drawee refuses, this does not excuse him from presenting it again at the time of payment. Case of this kind. Drawee refused to accept the bill the payee then brought an action against the drawee, but at time of payment, the payee presented again the bill to drawee and he paid it, payee gave no notice of this to drawee but proceeded with his action against him, and the drawee not knowing the bill was paid, paid it again himself, afterwards the drawee found out that the bill had been paid by drawee, and he then brought an action against the holder, for money had and received. The Court said in this case that the drawee should recover back from payee, deducting however so much of the money as the damages arising from the nonacceptance would amount to.

If the payment of the bill is limited to a certain time after sight, the question then arises, when must it be presented. There is no certain time fixed and the only rule is that it must be done as soon as it can be with any kind of convenience.

When payable at a certain time after date, it is usual to present it a day or two before the day of payment - no certain time fixed upon.  
5 June 2671.

It may be presented for acceptance and payment at the same time. 1 D.R. 713. If a man should send a bill of this kind to a factor, it is his duty to present it immediately, and give notice to his principal.

mercantile law.

If the acceptance of the bill varies from its tenor - this may be an acceptance and notice must be given as before.

Demand for payment at com law cannot be made in a variety of cases, untill such time as a man is obliged to make tender. But here the demand must be made on the last day that it is due, i.e. the last day of grace, and in sufficient time to have it protested on that day. vide D'Aguenard's Reports 74 B. 1 Shaw 829. Beaves 461.

It has been a great question whether these days of grace are to be attended on negotiable notes, But is now settled, that they may have days of grace same as Bills of Exchange.  
1 Espd 15 10 C. 104 10 R 167 420 148.

The bill must be presented at the usual hours of doing business, when persons are found at their offices and stores.

If the Drawee is absent but is willing to pay the bill, notice must be given - so also when he cannot be found. And in giving this notice, it is necessary that the payee be particular in the mode. 1 Thang 441 20 515 2 Bl 2747 10 R 170.

This notice must come from the holder of the bill, it is not sufficient that Drawee write to Drawee and tell him that he can't pay the bill.

If the parties live in different places, notice must be sent off by next post. If they live in the same place, notice must be sent within a reasonable time. Now what this reasonable time is, is a question, no precise rule can be laid down on the subject.

Formerly this was a matter of fact and left to the jury, but now it is a matter of law and left to the court to determine. But I have never seen a case where this reasonable time was extended over 24 hours, where the parties lived in the same place. 19 R 167.

Case of this kind. A gave a negotiable note to B on order, and B endorsed it to C. Now on the day the note became due & called upon it at 10 o'clock in the morning, but did not find it at home, he left word to have it call on him that day, but it did not call, & went next day, and A promised to pay the bill, but he did not, and next day C went to B and told him that it had not paid him, and that he B must. The court in this case held that the bill dishonored, and C could not recover, for not having given B notice in season.

As a general rule if the Drawee has no effects in his hands, notice need not be given to Drawee. 19 R 405. 410.

But this does not render it unnecessary to give notice to the indorser, for he must have notice whether Drawee has effects or not. 19 R 714.

It may happen that altho the Drawee has no effects in the hands of Drawee, yet he may receive damage for want of notice, and if he does I suppose he may recover. 22 R 740. 713 of Inland Bills. Notice is necessary, but no particular form of words necessary in the notice. 19 R 714.



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But in Foreign bills particular form of notice is necessary. Method is this - The holder of the bill presents it for acceptance, and if Drawee refuses, he then goes to a Notary Public, and tells him that he has presented the bill and that Drawee refused to accept. Notary Public then goes to the Drawer, and presents the bill himself, and if the Drawee then refuses, Notary minutes down on the bill the time of refusal. He then writes a Protest, which declares that the Drawee refuses to accept, and that the holder intends to recover all the damage he has sustained. No clerk or agent of the Notary can do this business, he must do it himself. 4 G.R. 170.

This protest must be sent away by the next post to the person charged with it, and to every person whom he intends shall be liable for damages. You must prove by parol that you sent the protest by the next post.

So also you must have a person to swear to the contents of the letter sent. Bot. P 271. 2 G.R. 713.

When the bill becomes due, it must then be presented for payment in the same manner as if it had been accepted, and the same ceremonies are to be gone through, only in this case the bill must be sent with the protest. Beauv 460.

If the Drawee cannot be found the same ceremony is to be gone

though. If this bill which is thus presented for payment is accepted but not according to the tenor of it, or half, still protest must be made.

If theDrawer seems likely to fail, the holder must request him to give security and if he refuses, holder may protest for better security. D. Ray? 743.

From this has originated the idea of suing for better security, but there is no such thing.

In this transaction you are to recover the principal, interest, damages, and costs. By costs are meant, expense of protest and the like to a Notary Public - as to damages, the mercantile is different from the common law rule. At common law the interest is always the rule of damages. But by mercantile law damages are allowed besides interest. So damages depend on usage different in different countries. In the Eastern States the sum is £20 per cent. Remote or presumptive damages even by mercantile law are never a rule. The actual loss is the ground of the rule generally. If usage has fixed no rule actual damages is the rule. Change 647. Brown 466.

Inland Bills of Exchange upon principles of Com law stand on the same footing as other Com law contracts, and of course there is no recovery of damages, and no need of notice in Eng.

How can this be?

By 2. State they have put them on the same footing as foreign bills. But we have no such Stat here.

So the only enquiry then is, what is an inland bill of exchange. A bill from one State to another is a foreign bill.

If the Drawee pay the Bill on account of D. he is no charge against Drawee so long as he accepts for honor of Drawee. Beaues 45<sup>th</sup>.

There may be an acceptance by Drawee for the honor of any Indorsee and this makes him liable too, notice being given, Drawee is to give notice in this case.

He puts his name at bottom with this "Accepted supra protest."

A third person may accept the bill for honor of Drawee or Indorsee and if he accept for honor of Drawee he is liable to all Indorsees.

The person who thus accepts for the honor of another is as much bound to pay the money as acceptor is. Beaues 45<sup>th</sup> 46<sup>th</sup>.

The Drawee may accept the bill after a person has accepted it for honor of Drawee - still this person or stranger is not discharged. Beaues 46<sup>th</sup>.

It is said that the holder of a bill is not obliged to present

obligation acceptor is under after he has accepted the Bill. He is under obligation to pay the bill to any person who holds it. If the drawee has no effects of drawee in his hands and accepts the bill, there can be no recovery by Drawee in such case. But

third person as indorser may recover. 1 Wils 185.

On the other hand if Drawee has no effects and pays the bill, he may sue the Drawer for what he has paid.

A Drawee can never be discharged after he has accepted the bill, on principles of Merchandise Law.

By Merchandise Law the holder may discharge the Drawee and look to Drawer for the money - so also when indorsed. Black is Repl. Tong.

No indulgence shown to Drawee by the holder with discharge him, as length of time. Siquetti vs Deuster in Tong.

A receipt in part from Drawee does not discharge the Drawee fully as G- in Tong.

All the effects the Drawee paying part of the bill has is that the Drawee has less to pay and if Drawer pays the whole the acceptor has nothing to pay. Hen: 4 B 88.

Conditional acceptance is good, but the condition must happen before the acceptor can be liable. 12 R 757.

It was formerly said that if there should be a recovery of part from the acceptor - this would discharge the Drawer or indorser. But it is now settled that it would not discharge him. 1 Wils 262.

There has been a question of this kind, whether if drawer or acceptor has been paid by the holder, and the Bank pays the bill, the bill is at an end, or whether the Bank can maintain an action on it.



mercantile law.

But it was settled that the bill is at our end. 1 Will 4th.

E.g. A gave his note to B or order, & indorse it to C, & since the  
drawee and I gave bail for him, C recovered judgment and then  
passed the note to E, and E gave him up the note, & then brought  
an action in name of E against B. The court held in this case that  
E must have his action against C according to Com law principles.  
An indorsee may maintain an action against either Drawer or  
Indorser as he pleases. 1 Stark 131. 1 Mac 441. 2 Barn 669.

Kennedy that the parties have.

Wherever liability exists between the parties, a com law remedy  
is the proper one, such as action of debt, Indebitatus assumpsit &c  
as between Drawer and Drawee, Indorser and immediate Indorser, &  
maker and promisor of a note if there has been a consideration  
passed between them.

But a holder cannot have an action of debt against the ac-  
ceptor. 1 Bond 485. 1 Wood 285. 1 Vent 152. 1 Stark 125. 1 Horne 680.

Method of declaring on a Bill of Exchange.

The ancient mode was very different from the modern. In the  
ancient mode they set out the custom at full length in the decla-  
ration on the plea that mercantile law was a custom. 12 Reg 145.  
But now this custom is not regarded or recognized at all, mercantile law  
being considered as part of the law of the land.

In the present mode you merely state the facts as they exist, without mentioning any custom. 1 How 317. 2 Le Ray 1542.

Now all the facts must be stated in the declaration, as that Drawer made the bill and directed it to Drawee, directing him to pay the bill to Payee.

So our promissory note you state in a similar manner.

In stating however a regard is to be had to the legal operation, for it is now settled that a bill or note payable to a fictitious Payee, you must declare that it was payable to bearer, for this is the legal operation. 1 How 313. 1 St 153.

Still if you state the whole story as it was viz that it was payable to a fictitious Payee, it will be a good declaration.

If a bill is payable to the order of B it is the same as payable to B and you may so state it in your declaration.

If two join in making a note, and only one of them signs it you may have an action against the one who signed it. 1 Burr.

If there are two or more signers and you may sue either of them. 2 Le Ray 1545. 2 Strange 319. Corp. 332.

If a note is made jointly, it must be declared on jointly, but no advantage can be taken of this only by plea in abatement.

If a Bill is payable so long after date you must aver that the Bill was made on the day of the date. 1 Sta. 22. 2 How 422.

Maritime law.

The place where it was made must be stated. This is more matter of form.

If payable at once, the name of the place where it is payable must be stated in the Declaration. In

every bill that is drawn must be subscribed by the Drawer, still it is not necessary to state this subscription in Declaration.

If it is a note you must say he made the note, you need not state that it was made by his agent or clerk. But if his servant had actually signed it you must so state it. 12 Mod 346 or 340. 20 Reg 1376.

In case of Partners you must state that they both made it. Bills that are drawn in fct you need not state that the 2<sup>d</sup> 3<sup>d</sup> bill was not paid in order to recover - only state the bill as it is. 20 Reg 510. 1 Show 224.

In all these cases it must be further stated that the Drawer delivered the bill to the Payee, and also if the bill is payable after sight, it must be stated that the holder presented it for acceptance, and that it was accepted or refused as the case may be.

If payable after date you need not aver that it was presented for acceptance, for it may be presented and accepted at same time.

Thus far of what is necessary in all cases. Now consider, particular cases.

If the action is brought against the acceptor, you

must state the acceptance, and generally according to the tenor of St. 188 Reg. 464. Sec 574. Sec 459.

Suppose indorse being the action, he has got all this to state and one thing further viz. that Page indorsed it over to him.

Suppose a number of special indorsements on the back of the bill all of them must be inserted in the declaration.

But if there is only one indorsement and after that it passed by delivery, only this one indorsement need be inserted.

When payable to "bearer" no indorsement need be stated, state that it was payable to bearer, and aver that he is bearer.

It need not be stated when the payee indorses it over that he delivered it, for the indorsement implies delivery. But in case of holder of a note you must state that he delivered it.

If the acceptance is partial state that it was accepted according to the tenor of it.

Suppose an action is brought against the Drawer or Endorser by a subsequent indorsee, it must be stated that a demand was made on the Drawee and that he refused to accept it, also that notice was given; and to save you must state the manner of your notice, this is true, but still if you do not, verdict cures it. But if you state no notice at all, verdict will not cure the defect. *Boston vs. App<sup>rs</sup> in Doug*



Non est de iure.

In an action brought by Indorsee against Indorser you need not state a demand of drawer.

Suppose Drawn becomes Indorsee can he maintain action against acceptor? I see no objection why he cannot.

Suppose a refusal to pay the bill, now can Drawee endorse it over to another person? he cannot, the bill is at an end.

Case of this kind in 42 R 407. A gives a note to B and indorses it to C, and C indorses it over again to A, now can B bring his action against C? The court said if B was a mere nominal holder, he could bring the action, but if he was the actual holder he could not.

It is usual to raise an assumption after having told this story. now <sup>is it</sup> necessary to raise this presumption? our courts have determined that it is. But I see no need of it - it is a mere matter of law. 12 R 558. 1 Salt 125. Back 409.

Many instruments are given on good consideration which are not in form of notes or bills because they want some quality which will make them negotiable. There can be no transfer of such instruments so as to lay a foundation for an action at law. 39 R 74.

A bill given to pay is always presumptive evidence of a debt due, but this presumption may be removed by enquiring into the consideration. But if a note is on the face looking as a bill,

then you cannot look into the consideration.

Whether you can enquire into the consideration of a bill under our law in England is a matter of uncertainty. Whoever transfers any of these instruments without indorsement is not liable on principles of mercantile law.

But as between the immediate parties as transferor and transferee an action will lie. This action is grounded on the old contract it is an action of assumpsit or quantum solvitur - 2 Wils 35-3.

The holder of a bill may have as many persons liable to him, as indorsed it and he may sue them all successively and of course he may recover judgment against all but he can have but one satisfaction.

The indorser may sue the Drawer or acceptor or indorser or all of them, and he will have costs against each. Suppose the Drawer or any of the others sued, comes and pays him, he can then take out execution against the others for costs only. 2 B & P 49. 2 see 115. or 115. If he has recovered against all then and one of them pays the debt and costs, he is prevented from taking out Execution against the others i.e. altho he strictly has a right to take one out, yet the court will consider it as a contempt, and this will restrain him. 1 Strange 515.

E drew a bill in favour of Ben C, C accepted it and B indorsed it over to L. L sued C and he went to jail but was afterwards legally

Recourse to Law.

Liberated. I therefore sued the Drawer and recovered, because Court said judgment of C was no satisfaction. After it had paid D he sued C on the acceptance, and the Court determined that he could recover from C. 49 R. 325.

Non est in point is the general issue to all these actions.

If any of these provisions should become bankrupts, the holder may prove his debt under the commission, and if all are bankrupts, he proves his debt under a commission of oaths, till he has got 10 shillings on the Pound.

Proof.

All the allegations in copy must be proved, and it is a rule that every thing you allege, you must prove.

If you allege that Drawer made the Bill, that Drawer accepted it - and that Indorser, indorsed it, you must prove all these allegations.

Suppose an action is brought by any holder (not maker) the hand writing of the Drawer must be proved. But if you prove acceptance, you will at the same time prove the hand writing of the Drawer. 1 R. Ray 444. 2 M. 946. 3 Burr 1334. 1 B. & C. 396.

Lord Mansfield in a late case doubts the principle whether proof of acceptance is proof of hand writing of Drawer. But no decision in support of his opinion - See Kay's answer to his opinion - Kay 203.

One exception to the foregoing rule, when drawer accepts, is, agrees to accept without even having seen the bill. This does not prevent him from proving that Drawer never drew the bill.

Acceptors hand writing must be proved of course.

Suppose Indorsee sees the maker, he must have authority to do this, and of course he must prove the hand-writing of Drawer.

If the Bill is payable to Bearer nothing need be proved but hand writing of acceptor.

If there are several blank indorsements the hand writing of all the indorsees need not be proved, he may strike out all of them except one or two, as he pleases and waive their provision. But he cannot strike out special indorsements.

Suppose a Bill is indorsed before it is accepted, now an acceptance after this indorsement is no proof of the Indorser's hand writing.

1 St. 654.

If the acceptance was conditional you must not only prove the hand writing of acceptor, but you must also prove the event to have happened upon which the acceptance depended.

If indorsee brings an action against an indorser, he must prove the hand writing of indorser - no matter whether acceptor's hand writing is proved or not in this case. 1 Hen. 8 388 12<sup>th</sup> Reg. 174.

1 Mang. 1444. 2 Bur. 675.

Now in all these cases where there exists a mere liability to pay money this liability merely does not lay a foundation for an action. The action must be founded on the ground that he has



Indorseable Bill.

pose the money, and this he must prove. 12th Reg. 1793.

If the Drawer sues the acceptor he must prove the handwriting of acceptor also, that a demand has been made upon him and that he had to pay the bill himself.

He need not prove that he had effects in hands of acceptor, for the law will presume this and if he had not be the duty of acceptor to prove it. 10 mod 36. 11 Wils 385.

If acceptor sues Drawer he must prove he had no effects in his hands, also the hand writing of the Drawer, and the payment of the bill by himself must be proved, in order to entitle him to recover.

Case in 3 Wils 15 in which I doubt the correctness of the decision - he ought in that case to have recovered damages and nothing more.

If an action is brought by the person who accepted for the honor of Drawer you need not prove effects in his hands.

In an action against Drawer or Indorser you must prove perfect transfer.

Protest without the Bill is evidence, but Eng. custom is to have the bill produced and I suppose this custom is adopted in this country.

A bill if not returned for non acceptance, but for non pay-

- must only.

When an action is brought against one, and the hand writing of another is necessary to be proved, direct proof must be made. But when the hand writing of self is to be proved a variety of circumstances may be adduced as proof - as confession of the fact &c. 2 Mann. 1481 & 61.

Where a man induces by another as his servant, you must prove the hand writing of the servant and also his authority. 11 Brod & 346.

In these cases where protest is made, you must prove that the person has had notice, and this is done by proving that you put a letter in the Post office.

In an action brought on note of hand and the maker professes default - you need not prove his hand writing or a writ of inquiry, for the Defendant acknowledged it. 2 B. & Ryd. 48.

Green vs. Hearn in 3. D.R. 301

After a note of hand has been negotiated, the consideration cannot be enquired into, only as between the immediate parties.

Illegality of Consideration.

Rule of Law as between the maker <sup>of a note</sup> and Promisee -

- Illegality of consideration in a note with destroy it; and this is a rule of Com. law. But after it is negotiated illegality cannot

Mercantile law.

be enquired into only by the immediate parties.

If the illegal consideration does not appear, he may plead it specially, or may give it in evidence under the general issue.  
1 B.R. 445. 3 B.R. 454.

If the illegality arises from a particular Stat. and parties enter into a contract contrary to that Stat. and agree to pay, an unlawful consideration, neither of them are bound by it.

But if one pays the whole, he cannot recover of the other. Still if he consents to the payment of the money by his partner, or has given him any authority to do it he is bound i.e. both are bound.

Any contract entered into which will induce an illegal ~~and~~ contract is void. 4 Burr 2069. 1 B.R. 638. 3 B.R. 413.

If a Merchant who is not a citizen of this country should sell to an American, goods knowing that they were to be smuggled, he can recover of the Dept. This was formerly a question, but now it is settled. Coif. 341. 3 B.R. 454.

But a citizen of our own country could not recover in such a case. There are two cases where the court have allowed illegality of contract consideration to be gone into after the instrument is negotiated, and this was passed on account of the particular phrasing of the Stat. These two cases are Money and Gambling contracts. The Stat. declares the original contract

12 in such cases to be void to all intents and purposes.

2 Thomson v. S. Lowe or Walker in Drought

There can be no recovery against Drawer or acceptor of these notes. But suppose Indorsee sues indorser on this note of money, he can recover, for the indorsement is a sufficient warranty that the note was good. and if it proves not to be good this fact will entitle him to recover. So it don't touch the principle just mentioned.

A Bill may be indorsed over after tis due, but the indorsement in such case may be impeached. 3 T. R. 81.

It gave a note to B, this note was noted for nonpayment, and it was indorsed after it became due. The Court in this case treated it as tho there had been no negotiability at all about it.

Bank notes, Bankers cash notes, and Draughts on Bankers.

These are all treated as money, they are considered as cash. So if a man should devise "all his cash" then wife takes.

In guaranties all consideration is void except money. 3 T. R. 554.

Well, tis said if they are money they are a tender too - here the Court shd. shut, and give no decision. But if they were decided to it, I suppose they would say that they are a tender. This is not the law in our country, if it is tis only applicable to the Bank of United States, and tis reasonable that it should be in a state where the bills of that State are current.



The caudle law.

Bank notes, Bankers notes, and Draughts on Bankers are received as cash, and if the person receiving them don't within a reasonable time make demand upon the person who made them, and a loss is occasioned by it, he is the loser. 1 Bl. C.

What this reasonable time is, is a question of law. It is said that every case must be governed by its own circumstances. But I believe there is no case to be found where the time has been extended over 24 hours. In all the cases I have examined demand has been made within 24 hours, where the person recovered. 1 Sta 416. 2 do 1248. Beaur 482.

These are always payable to Bearer, and they are not payable without demand. But common notes are payable without demand. These must be paid in money. 7 J.R. 423. No protest is to be made of them. Burr 1519.

Question has been made whether a man must not present if the acceptor has absconded. But it is now decided he need not.

It is said if Drawer or Indorser was a Bankrupt at time of acceptance, no need of giving him any notice. I doubt the correctness of this decision. 3 Beaur 1. Cook 168.

Suppose Drawer absconds with it excuse sending him notice. It said notice need not be sent.

But if Drawer has left an agent or clerk, I see no reason why notice should not be sent to them. Exp. cas. et. P. 516.

Accident has caused, or sudden illness or death, is from being done at that time.

Can an action be brought for non acceptance or must you wait till time of payment? you may sue for non acceptance.

Bill of Exchange in Bank

Drawing a bill is not a payment of a debt, but it suspends all right of action at law till it is known whether it is accepted or not.

Est. cases A.D. 106.5

It was formerly a great question how a recovery was to be had on a bill of exchange when the payee was a fictitious person.

The question arose upon the principles that no person could bring an action without proving the hand writing of the drawer, and as in this case the person was fictitious how could a recovery be had. As where a person draws a bill on a fictitious payee, and indorses it in his name.

But it is now settled that such a bill is payable to Bearer, and that the holder has a right to sue and recover upon it in the same manner as if given to Bearer. 3 Edw. of Ryd 208. important.

The acceptor is always holder if he knows that the payee is fictitious. So also if he is not acquainted with this, still if he gave authority to drawer to draw on him in fictitious names he is bound.

Some Remarks on the right of Arrest for Debt.

penal law. Arrest for Debt.

The common law allows different Executions viz. a *capias ad satisfaciendum* to take the body only, not goods, or he may take out a *fiat facias*, which is levied alone on the property - if this don't pay the debt, he may still take the body. But at common law you cannot take both the body and property at same time.

If one law in Connecticut. This law has been altered and is in many of the States. Under our Stat. Execution issues containing a *capias ad satisfaciendum*, and a *fiat facias*. yet you may not levy on but one. The alteration is this, you cannot take the body till demand of the money or personal property, and refusal to turn it out.

Real property may be taken after demand for a person cannot protect his land by the body, but can protect land and body also by turning out personal property.

Land will not protect person from arrest, for that cannot be readily sold.

Further, the officer can't take the body till it appears that there is no personal property. So he can't be bound to take the property. If he suspects the debtor's title to the goods. And real property must be taken till demand and refusal of personal property. Land is protected by personal property but not by real, tho' the officer may take real if he pleases.

But if he takes the body, he never can afterwards levy on goods even in Connecticut. No great reason for this.

If, however a new note be taken in prison to obtain liberty, is not  
 note for duress, and then you may again levy on the body, for this is  
 a new debt, say I suppose a note given after liberation would  
 not be void, as a modus factus, for moral obligation would be  
 a sufficient consideration.

Yet a man may obtain his liberty by act of Insolvency.  
 In principles of com. law no body is obliged to support an imprisoned  
 debtor. So if no compaigner, he must starve.

We have a Stat which allows a man to give Creditors 14 days no-  
 tice and then swear out. The object of this Stat is not to liberate  
 the prisoner, but to prevent starvation, for he may still be kept  
 in goal, tho at the expense of the Creditor or a personated price  
 allowed by County Court.

But tho he obtains his liberty by the poor prisoners oath, yet  
 his property is always liable, for a fiari facias will issue on a  
fiari facias being brought. say I suppose debt on judgement  
 would lie — tho the difference between this and a fiari facias  
 would be that in the latter you recover principal & interest.

In debt only the principle. To be sure when this Stat was first  
 enacted, it was retrospective in its operations. But now is other-  
 wise — the contract is made on this supposition.

The same objection may be made to insolvent acts and of Bank-  
 rupt acts. But this question has arisen, whether one Stat's

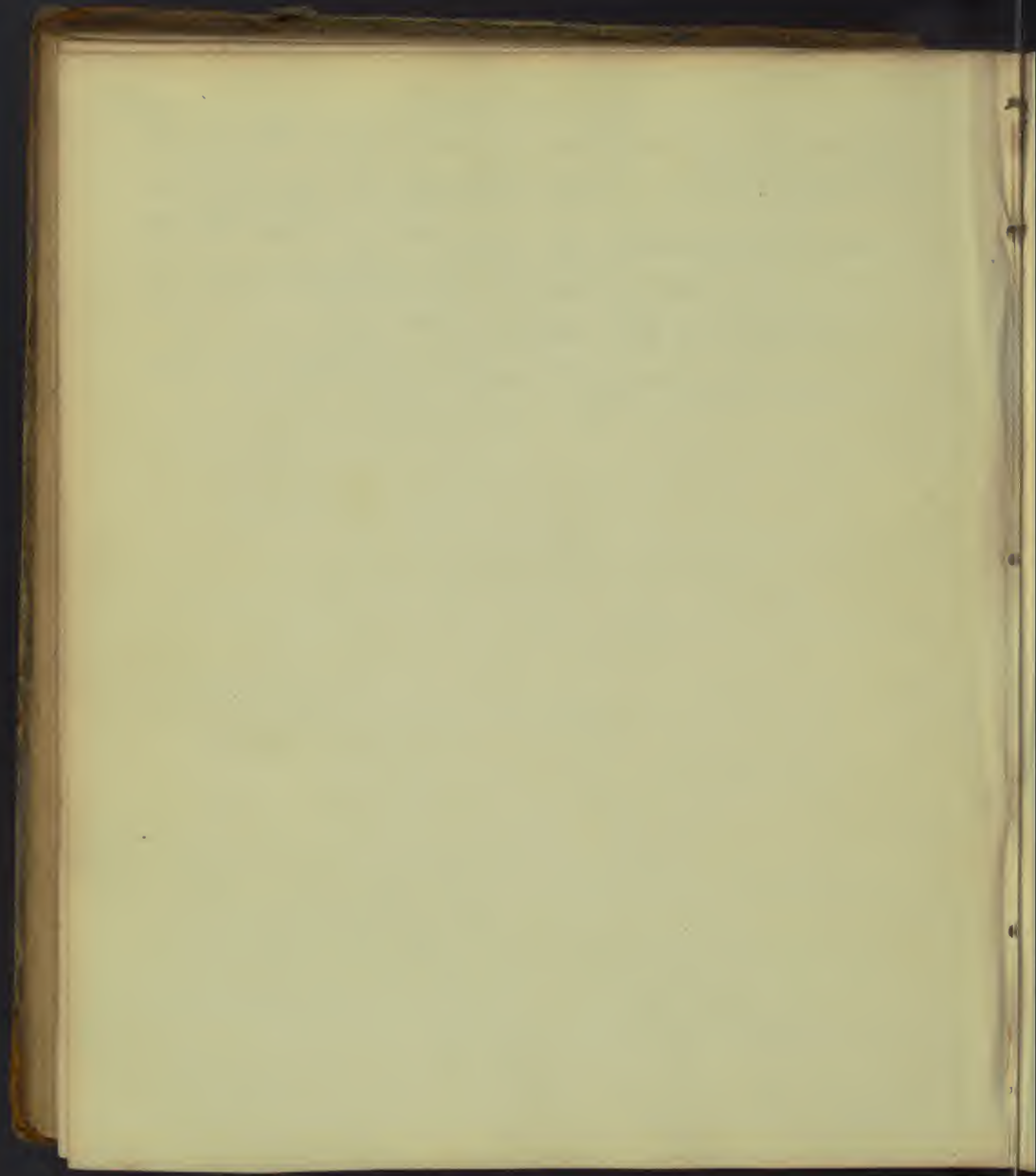


Verastile Law.

can pass these acts of Bankruptcy and Insolvency; for the treaty with Eng<sup>d</sup> says, The Legislature shall not impair contracts.

But the courts say this means they shall not do it except in the known, established ways of impairing them, of which this is clearly one. Judge Chase so decided. He said ex post facto laws never applied to civil cases, but only to criminal law.





# Insurance.

The doctrine of insurance is a branch of the mercantile law, and is founded on the law of exchange. This usage varies in different countries, but is generally much the same every where. This usage is the same throughout the United States. But there are certain States varying their usages according to the government of the country in which they are made. I shall notice those States as we proceed with the subject. We have no Stat of this kind in this country.

Any person who contracts is supposed to have this usage in contemplation, for he cannot plead ignorance of it.

Insurance is a contract of indemnity against risks or against the happening of certain events.

Marine insurance will be the subject of these Lectures.

The terms insurer &c explain themselves. The man who insures is called the insurer, the person insured is called Insured. The sum given is called the premium, and the instrument in which the contract is contained is called the Policy.

It is a principle of mercantile law that the insurer must have an interest in the thing insured, otherwise tis a mere wager or gambling contract i.e. a wagering Policy which is void. This is a principle of Policy. The insurance is made against certain perils, or against an event of which danger is apprehended.



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In Eng<sup>d</sup> they sustained wagering policies on the same ground as they did all wagers, but now by Stat<sup>y</sup> wagering policies cannot be sustained.

Our law found does not destroy contracts in many instances, the courts of Chan<sup>y</sup> will generally take care of fraud. But in maritime law the least fraud will destroy the contract. The transaction must be marked with the strictest integrity, and the fraud may consist as much in concealment as in direct falsehood.

What persons may be insured?

This relates to aliens, for any citizen may be insured.

The property of aliens may be insured in case there is no enmity existing between the two nations.

The Eng<sup>d</sup> usage has been very different from the com<sup>l</sup> law. The property of an alien enemy upon principles of maritime law is not insurable.

But the received opinion in Eng<sup>d</sup> was that it could be done, and they insured the property of an alien enemy in the American war. This led to the passing of acts forbidding the practice. But these acts were temporary, for they made the practice illegal only during the war.

Hardwick & Mansfield opposed these acts. 11 Wm 320. 19 & 84.

It was made a question and agitated in their courts whether

the alien enemy could maintain an action against the insurer supposing he refused to pay and it was decided that he could not. However the general principle is not affected by this, for after the war is terminated the action may be maintained.

6 IR 28. 3 Burr 1734. 1 Bos & Pul 354. 8 IR 35.

In this country I think says the Judge that an alien enemy's property ought not to be insured, still if we have any established rule as to this point we ought to follow it.

As to a neutral residing in an enemy's country and carrying on trade or in partnership with an enemy, it is settled that he can recover. 6 IR 613.

What persons may be Insurers?

By our cantile laws any person in an individual capacity, or any number of persons united into companies may insure, of course where we have no such Stat as in Eng? it will apply to us. But in Eng? they have passed a Stat excluding all companies from insuring except two - the London insurance company, and the Royal Exchange company. But individuals may insure as before.

So where A and B acted jointly in the name of A and the company lost. A brought his action against B, for his half, but he could not recover it. 2 Hen B 379.

So where A and B agreed to

### Insurance.

be in partnership and a loss ensued, and A paid it up, and B paid his half to C to be paid over to A, and C would not pay it, A brought his action against C to recover it, but the action could not be sustained. I should doubt the principle in this case, for if A had got the money into his hands, he could hold it and I conceive it to be the same as if paid to A. Park 8. 694 465. But suppose A should insure for a person who did not know of this agreement between A and B, to wit, he can recover.

### Subjects of Marine insurance.

The terms made use of are 1<sup>st</sup> Merchandise, 2 Ships, 3 Freight, 4 Tonnage, and respondentia bonds will be considered hereafter.

There are certain articles, or articles under certain circumstances which cannot be insured i.e. if they are, the policy is void.

1<sup>st</sup> Goods which have been smuggled cannot be insured. Law 348.

In order to evade this, persons entered into a contract to deliver these forbidden goods at such a place, for which a premium was given. But in Eng. it was held this void ab initio and obliged the person to return the premium.

It has been a question whether a citizen of one country could insure goods in another country to be smuggled into the country of the insurer, i.e. whether a citizen of one country could make a contract to evade the revenue laws of another country. The French

writers consider such contract as void, but in King's petition that such a contract is not void. Planch vs Fletcher in Doug. Park 287.

Insurance upon a voyage to a colony of the mother country is void provided commerce with it is made illegal a insurance is forbidden.

So also if any particular article is forbidden to be imported or exported, insurance upon them is void, because of the illegality.

Insurance upon contraband goods is void on the ground of the illegality of carrying such goods.

Contraband goods consist of arms, ammunition, war stores, and horses, and in short every thing which is necessary to equip an army or navy. Provisions are considered as contraband if the place is besieged or blockaded, and insurances upon provisions to be carried there are void.

In case a port or country is blockaded by proclamation or Decree only, and not actually blockaded by ships, if a ship is insured and goes in violation of those decrees and is taken, still the Insurance is holden and bound to pay it, and this is on the ground that this commerce is not illegal *ie.* it is not so considered by the laws of nations, but only by that nation who makes the Decrees &c. But in case of contraband goods it's different, for this is a goods to be illegal by all nations.



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In an actual blockade the liability of the Insurer to pay rests upon a knowledge of the blockade. For if he is unaware that such a place is blockaded, and the person should go there and be taken, the Insurer would be liable.

But after notification is given of a blockade, and a person attempts to go there and is taken the Insurer is not liable. So if after he gets to port and is notified that he is blockaded, and he then attempts to sail, the Insurer is discharged if there is loss.

Again Insurances are void if made during the continuance of an Embargo. This trade is illegal and of course an insurance upon it is void and illegal. Park 234. Johnson vs Sutton in Tang.

Commerce with an enemy in all countries is held to be unlawful, therefore an insurance of vessels belonging to an enemy is void. I do not know how this is considered in this country, but in Eng it has been usual to consider those policies as good, and did in fact so consider them in the American war till temporary Stat prohibited it during the war, and then it was determined that an alien enemy could not maintain an action to recover from the Insurer, on the ground that an alien enemy can maintain no action of any kind. Yet the principle is not affected for after the war is concluded it could be recovered. Still I am clearly of opinion says the Judge that the insurance is void, on the ground that the commerce is illegal.

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It was made a question whether goods purchased in an enemy's country could be insured, and it was decided in the Court of Com Pleas in Eng that they could. But afterwards in a case of the same kind the decision of the Court of Com Pleas was reversed by the Court of King's Bench. So that now it is settled that an insurance upon illegal consideration is void. for 1<sup>st</sup> decision vide 1 Bury. 345. for last 3 B. 548. And I am of opinion says the Judge that our Court would decide in the same manner i.e. that such insurance is void.

There are some things which cannot be insured - wages of masters, and mariners of vessel are not insurable, and the reason is to preserve all their exertion to save the ship in times of danger, and not on ground of illegality, neither can any thing in the nature of wages be insured. 7 T. R. 159. at 157.

But if after the wages are paid they are laid out in purchasing goods, these goods may be insured. Any thing in specie may be insured which is considered as belonging to, or an appendage of commerce. So warehouses erected on the shore may be insured.

And it has been determined that a Port is a subject of insurance. 3 Burr 1405. 1 B. L. 573.

Freight in general is a subject of insurance. tho there are some wages to the contrary.

It is a settled principle that in order to recover for freight

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It must appear that some risk has been run.

If a ship is lost in the harbour before the goods are on board the Policy is void even if a part of the goods are on board.

Again there may be cases in which nothing is put on board, & yet the Insurer would be liable. So if a ship and freight is insured at a particular place, say at New London, and the goods were to be put on board at another place, say at New York, were if the vessel is lost in going after those goods i.e. between New London and New York, still the insurer would be bound to pay the policy.

As to persons who may insure. Any person who has a qualified property may insure. So a pledgee may insure for he has an absolute disposal of the property. So the person who has the legal property may insure.

Case of this kind. A of Holland writes to B of London informing him that he has a ship and a quantity of goods and requests him to get them insured in London, and B gets them insured, after which A indorses over the bill and ship to C, and C writes to D in London to get the same goods and ship insured, and D gets them insured, now both of these insurances are good.

17th 1759. 18th 1759. 21st 1759.

There has been a question whether a man can insure the profits i.e. what he expects to make in this voyage. I think it cannot be done and that is contrary to law of nations. But

16 There are several decisions which seem to favour the idea that it can be done. Mansfield determined that it could be done.

12th 25y. 237

It is settled that a mere trustee who has the legal title without any interest can insure. 8 D.R. 1 Feb 315

Wagering Policies. Policies are either valued or open.  
A valued policy is where the Insurer and Insured agree that the Ship is worth so much.

An open policy is where no such agreement is made.  
A wagering policy then must be a valued policy - these policies are void on principles of surety law. But in Eng these wagering policies were sustained upon the same principle as any wager would be, till the Stat 19 Geo 2. which declares them void.

Now tis a question whether at even law such a contract is good, now tis clear that such contracts are directly opposed to a maxim of our laws as being against sound Policy.

Now I take it to be a clear and well established principle, that where there are maxims paramount to every thing else and decisions opposed to those maxims, such decisions are not law, if made by those Judges who adopt the maxims in cases in general. I therefore think we may overthrow the Eng<sup>l</sup>h decisions on this <sup>ground</sup> subject.

We have no Stat on this subject, but I say wagering policies should be void in this country on the ground that they are



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opposed to second policy. 15 A. 56. 2 Robt. 1. Comp. 729.

The principle is the same in all wagers, and if wagers of all kinds ought not to be collected wagering policies ought not to be. 3 R. 463.

I will now state on what footing these wagering policies stood in point of authority. The first decision on this subject was in 1689, which declared wagering policies void, and in 1692 it was so decided in a court of Chan. 2 ver 269.

In 1710 we find these policies to be held valid. 10 mod 79. this was first case which held them to be valid.

But in 1716 the court of Chan. 2 decided that they were not valid, and again in the same year Chan. 2 decided that they were valid and from this time to the making of the Stat they were held to be good. 2 Strange 1250. this case was the cause of making the Stat.

We may therefore conclude that these policies are opposed to a maxim of com law, and that the mercantile law is also opposed to them.

## Reassurance and Double assurance.

A Reassurance is when the assured gets some person to insure him, this is allowable by the mercantile law, tho' forbidden in Eng<sup>d</sup> by Stat. except in two cases viz in case of insolvency and in case of the death of the insurer. Now the assured can never resort to the reassurer, for there is no contract between them.

It double insurance is where a man makes two insurances upon the same thing. In this case however there can be but one recovery, and the insured may recover the whole, policy, from one of the insurers, and in such case the insurer who pays the whole can recover half from the other insurer, even tho' there is no privity of contract. 1 B. & 416. B. & 242.

This rule was adopted in the time of Shower. 1 Shower 130. 2 Burr 489.

Risks to be insured against. All risks may be insured in one policy, or any part of them may be insured. If the insurance is against the perils of the sea and the vessel is lost by the negligence of the master and mariners, the insurer is not bound to pay the policy he is acquitted. But if the insurance is against the oil-tang, or negligence of the masters & mariners, the insurer is then bound - such an insurance is often made.

If the voyage is illegal or the commerce carried on is an illegal one, generally the insurer is not liable.

By that no insurance can be made upon slaves.

The risks which a policy includes are the perils of the sea - men of war - fire - enemies - pirates - rovers - thieves &c and in short all damage of any kind to ships, goods, and merchandize.

Now by the common law - merchant all losses of any kind if included in the words of the policy were recoverable. So if in part of the goods were damaged you could recover for them.

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But this made great difficulty, therefore this liability for all loss is now qualified when the loss is partial. But is not qualified when the loss is total.

If the loss is partial you cannot in all cases recover for it. A memorandum is now issued annexed to all policies and in that it is agreed that a partial loss for certain articles the Insurer shall not be liable. These are articles of a perishable nature E.g. Corn, Fats, Salt, fruit and Flour - for certain other articles he is liable but not unless they exceed 5 per cent. These are sugar, tobacco, hemp, flax, hides, and skins. As to all other goods the loss must amount to 3 per cent at least, unless the loss is general, or the ship is stranded. If the ship therefore is lost by stranding the old common law is restored and the loss may be recovered. 3 Burr 1553, 1550. 7 W 216. 4 Do 83 or 89. 7 Do 210.

"Unless the loss is general" by this is <sup>not</sup> meant a total loss, it means if a loss arises in endeavouring to save the ship, as by throwing overboard some of the articles, and in such case the smallest loss must be paid for. 3 Burr 1550.

In case of a total loss of the, permentioned articles the Insurer is liable and is only in a partial loss that the Insurer is not liable in certain cases.

It is always that when the loss is so great that the salvage is not as much as the freight this is a total loss. 2 Strange 405.

17) to decide by Lolo Chamfield. Park 116.

It has been held of the articles specifically remain the good for nothing, the Insurer is discharged. This decision was grounded on a long usage. However, he now deems it to be law. 7 W 210. and I think it not, for if the articles are good for nothing, and do specifically remain yet there is a total loss.

The owners and masters of a ship may be liable in such a manner as will discharge the Insurer. If the ship which they provide is defective and such an one as ship carpenters would pronounce not to be sea worthy and a total loss on this account, the Insurer is discharged.

For the negligence and wilful misconduct of the master, the Insurer is discharged if this misconduct was not insured against.

The owners and masters are liable for the embarkment of the mariners.

Case of this kind, a mob entered a ship and robbed her, the question was whether the master was liable and it was determined that he was liable. But I conceive this decision was not founded on the principles of marine law. 10 East 238. 190.

But for theft committed on board by the mariners the master is liable, and this notwithstanding the word thieves used in the policy for there is meant Pirates &c and not common thieves.



Heff. Beas 313.

Duration of the Risk.

and first on that of goods. The usual words of the policy point out all that is necessary to be known on this part of the subject.

The usual words of the policy say that the venture shall begin after the goods are on board, and shall continue till she shall arrive at port and the goods be safely landed and discharged. Therefore if the goods are lost in carrying them to the ship, the Insurer is not liable.

The goods must not only be carried on board, but they must remain there unless there is some great necessity for removing them. So that no master of a ship after the goods are put on board can change them into another vessel except this ship is disabled and in danger of being lost. Beas 345.

The Policy says the risk shall continue till the goods are safely landed and discharged. Now this extends to the boat or lighter which carries them on shore. The Insurer has a right to land them at any wharf in the port under the protection of the policy, unless he otherwise expresses.

It is said if the Insured should take his own lighter to carry the goods on shore, the Insurer would be discharged.

Strange 1286.

But it is said if the Insured hires a boat, and

the goods are lost, the Insurer would not be discharged.

However it is now settled that it makes no difference whether the Insured uses his own boat or hires a person to land the goods, for in both cases if they are lost the Insurer will be liable. Marshall on Insur. 166. Park 214.

If the goods should be sold from the ship the Insurer would be discharged, the thing is not insured.

There are some trades in which it is necessary to keep the goods on board, and sell them out when called for. This is the case in the trade to Newfoundland and on the coast of Labrador. Robt. vs Kennedy in Doug.

Duration of the risk when the insurance is on the ship.

This depends on the words and construction of the policy.

If the policy says "from N.Y. to London" - in this case if any accident happen before the ship sails the Insurer is not liable, but if the owner starts with a bona fide intention of sailing the risk commences, and the Insurer is liable even if she does not sail 40 yards. Therefore in order to be secured from loss before sailing they generally insert the words "at and from N.Y. to London &c" and this makes the insurer liable before she sails. 10th 545. 2d 359. 3d 562.

They often insure both ways "at and from N.Y. to London and back

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again". the question is when does the new risk i.e. the risk upon the homeward voyage commence? It is said it commences immediately after she arrives, but this is not the case for the redemptive risk continues 24 hours after she arrives therefore I think the homeward risk commences when the other ends.

Part 35.

The risk on the ship takes last no longer than 24 hours after she is safely moored in port. But suppose the ship is seized for smuggling after the 24 hours have expired the Insurer is discharged even tho' this was for an act committed during the continuance of the risk. Lead &c 12R 252.

Now the insurance may be for a particular time as for 6 months, in such case the Insurer is discharged after the time has expired. 12R 260.

It has been determined that the risk continues if the ship is added on Quarantine grounds I charge 1244. Peak cas 211.

Whalton prevents the ship from being unloaded is evidence that she was prevented from being moored in port. 12R 449. case in Skinner not late. Part 38.

The insurance upon rigging and provisions continues generally no longer than they are on board but the rule is different in some cases by usage. Abene 341. 47R 266.

Somewhere there is a usage in trade different from general

18 usage, the risk is covered by the usual words of the policy.

3 Burr 1707.

Suppose the Policy says the ship may touch at any port or ports, by this is meant that she may touch at the usual ports in the direct track. but she must not go out of her track to touch at any, only in cases of necessity. Park 500. 30.

If an insurance is made upon a foreign ship and they have particular usage, these usages must be made known to the Insurer (as he is supposed not to know them, soon Insurer will not be liable. Lavener vs Wilson in Doug'

### Risk on Freight.

This commences when the goods are put on board. 2 Sha 1251.

But it seems if part of the goods are shipped, the whole is recoverable. 3 F.R. 262.

If the goods are insured at one place before they are put on board, and the ship has to go to a different place after them, the risk commences when she sails after them, and if she is lost in her passage after them the Insurer is liable. 6 F.R. 445.

Now must be nothing done by the Insured to change or increase the risk, so if he takes bills of lading, how the policy is void and the insurer is not bound.

One of this kind letters of lading were taken and it appeared in evidence on the trial that they did not intend to use them, and



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but that they were taken for the purpose of obtaining insurances. The court held in this case that the Insurer was dischargeable on the ground that the temptation was such as would tend to make them deviate from their track, and avoid the contract. 305 P.R. 550.

Another case Letters of mark were taken and with the same view as in the former case, but in this case there was no certificate from the officer that there were letters given. The Captain deviated from his track and a loss occurred. The court determined in this case that the Insurer was liable.

Now these two cases are inconsistent with each other, and the only way of reconciling them is that in the first case there letters were legal, having been certified by the proper officer, but that in the last case they were not legal letters of mark and the court considered them as having none at all. 6 P.R. 349.

### Of the Policy.

Policies are said to be open and valued. An open policy is where the value of the ship &c is not fixed upon, but left to be determined after her return. A valued Policy is when the value of the ship &c is fixed upon by the parties before she sails.

There is no difference between these two only when the loss is partial. A valuation is prima facie evidence that there was no wagering policy. 1000 716.

This business is generally done by the hands of Brokers and agents.

The agent must either have an express authority given him from the Insured, or it must appear to have been his duty.

Sec. 2727.

It is a rule of our law that no person shall be obliged to act as agent for another, but the rule is otherwise in mercantile law, for there are three cases in which an agent shall be obliged to act, or become liable himself.

1. If a person has effects in the hands of another, and requests him to insure a vessel, the person is obliged to do it, if the effects are sufficient.

2 Case is where a man has a clerk, servant who has always been in the habit of doing business for him and has never refused, in such case the agent shall be obliged to insure if requested or become liable himself.

3 Case is when a merchant abroad sends a bill of lading to his correspondent, and he accepts the bill and gets the property - he is then bound to insure. 11 R 22 or 221.

I think in the last case the rule would be the same at our law.

Wood has settled that where a voluntary agent undertakes to do business for another and a loss arises by means of negligence on his part he is liable. Exp. A 74.

So where one broker employs another Broker

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to insure, and he forgot to show him the letters respecting the situation of the ship and a loss incurred, the first broker was made liable.

The concealment of any fact will destroy the policy, but the Insured can recover from the agent. 79 & 157.

And the agent may avail himself of any defence which the Insurer might have done. Part 303.

The agent is bound to deliver up the policy whenever the Insured calls for it. Harda vs Carter Tong.

In most places policies the name of the ship is inserted, and in such case the goods must go on board that ship only. But the name cannot always be ascertained, and then the usual instructions are to load any "ship or ships" which include vessels of every description.

The name of the master is generally mentioned in the policy, and if a different one is put on board the Insurer is discharged.

If the name of an experienced master is inserted with a view of obtaining the confidence of the Insurer to make him insure the more readily, and there is no intimation of sending this man - tis a fraud and the policy is void.

When the insurance is on goods, there is no need of particularizing them - tis sufficient to say "upon goods and merchandise."

If however these goods are specified, and there are other goods

14. on board not specified and they are lost the Insurer is not bound to pay the policy. 3 Burr 1394. 1 W. R. 399. 405-422.

The master's cloaths may be insured and if they are they must be specified and so must the provisions be specified for they are not included under "goods and merchandises". 4 W. R. 206.

Goods loaded to the deck of a vessel must be specified. Park 20.

Bottomry and Respondentia bonds are not considered as goods or merchandise, tho in some trades they have been so considered.

Foreign coin, ballion, jewels &c must be specified. In Eng however their custom is to the contrary. 4 Burr 1966.

The quantity of the above mentioned articles must be made known to the Insurer.

It has been made a question whether the insurance of a ship when she is loaded is an insurance of the cargo. But it is clear that these are different articles, and an Insurer of one does not include the other.

The voyage must be truly described in the policy, the time & place of departure and the place of destination must be named, or else the insurance is void.

There is provision made sometimes to permit the master to go out of his usual course. But generally he must not deviate from his track. See on Beach v Long. 1 W. R. 463.

If however the place of destination is falsely inserted it will vacate



the policy.

If a ship takes out clearance and is insured for one place and intends going to a different one and is lost before she comes to the dividing point, the Insurer is liable. An intended deviation does not discharge the Insurer.

There was a decision contrary to this rule in *Maryland*. A vessel cleared out from Baltimore for a certain particular place & intended going to another, she was taken in the Chesapeake bay long before she came to the dividing point. But the Court decided in this case that the Insurer was not liable.

The insurer is discharged if the ship starts a different voyage from that for which she was insured. So it was from any port in N. B. to London - she started a fishing voyage and then proceeded for Baltimore and was lost, here the insurer was discharged, for it was a deviation. 2 R. 30. So an insurance upon a voyage from A to B and it was manifest a deviation was intended, for she intended to go to B and then to C which is a deviation, but she is lost before she comes to the dividing point, here the Insurer is liable. 2 Hen. 3 413.

Case of this kind The intention was to go directly from A to B and she is so insured with liberty to go to C, and she cleared out for C, but she never intended going to C, and did not go there. Now is the Insurer liable? Court decided that he was bound to pay.

I think this decision was founded on a different principle from cases of this kind in general.

I think if she did not go by the way of B the Insurer would be discharged, if that was the terms of the Policy.

A ship is insured from A to B and there are two tracks, now if the owner of the ship directs the captain to take one of these tracks and he does and the vessel is lost, the Insurer is discharged, for the Insurer has the right to liberty to direct which track shall be taken. 7 J.R. 162.

In all cases of insurance the Perils are to be insurable against must be enumerated, when the Insurer is discharged.

In all injuries to goods arising from bad storage or being exposed to the weather, the Insurer is not liable, for there was negligence on part of the Insurer.

The words "lost or not lost" in a policy have not been taken notice of as yet.

There is a clause introduced into the policy to enable the Insured to procure all necessary means to save his ship, at the expense of the Insurer, and the policy always promises to indemnify the Insured.

Policies generally acknowledge that the premium is received, but it is not always the case that it is received, for Adulterat.

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Affirmavit will lie for it, tis inserted only for the purpose of preventing the insurer from saying that he has never received it.

A Policy may be altered by a court of Equity when it can be shown that it was not made according to agreement, and here parol testimony may be introduced to show how the agreement was, and this is the only case where parol testimony is admissible to explain or alter a written instrument. 1 Vesey 317. 10th 544.

In this Policy is contained express agreement on the part of the Insured called warranties, and these must be literally and strictly complied with by the insured or else the policy is void. A warranty is an agreement by the assured appearing on the face of the Policy, qualifying and explaining it.

This warranty is in the nature of a condition precedent i.e. it must be complied with before the Insurer can be made liable and if tis not complied with the policy is void.

Sometimes the warranty consists of affirmations, as that tis a neutral ship - that she sailed on such a day, that she carried so many guns &c. so it may promise that something shall take place - as that she shall sail at such a time, that she shall go under conveyance, and shall be of such a force &c. now the least variance from these warranties will vacate the policy -

20. It is not necessary that there should be any fraud in these cases to vacate the policy.

There are also implied warranties resulting from the contract, as that the ship is sea worthy and that she shall be navigated with skill and care — that the voyage is a lawful one, and that she shall go in the usual track.

The rule as to express warranties is that they must be strictly complied with, and these contracts are all void ab initio if the warranty is not strictly complied with; and in such cases the premium must be returned if it is impossible to perform the warranty.

This breach of warranty may be occasioned by any means, it is not necessary that there be fraud or negligence in this case to vacate the policy. So where the insured warranted to take 50 hands on board at Liverpool but took 46 only at that place and sailed to another port which was contiguous to Liverpool i.e. very few miles from Liverpool and took the 4 remaining hands to make up his complement. Still the Sumner was discharged. 1 R.R. 343.

It therefore makes no difference if the best seaman in the world can be given for not complying with the warranty, for if it is not strictly complied with, the policy is void. So if a ship is prevented from sailing by means of an enemy at the mouth of the harbour, policy is void. Dray 601. 790. Parsons 103, Doug.



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So if a person warrants to sail on such a day and he is prevented by means of an embargo laid by Government, still the policy is good. Comp 784. Park 326.

Case of this kind. A warranty to sail on or before such a day, viz the 1<sup>st</sup> of August, she sailed before that day and went out of her course to another port to get a convoy, and she would have sailed from this last port on the appointed viz 1<sup>st</sup> of August, had she not been prevented by an embargo. question was whether Insurer was liable or not. The court determined that he was not discharged - The doctrine to be drawn from this case is, that a ship has a right to deviate from her course in order to get a convoy. Id. 601. Thibault vs Ferguson in Doug.  
Wilmington

Case of this kind a vessel sailed and before she got out of the port a storm arose which forced her to put back again and on that day an embargo was laid. The Insurer was not discharged in this case. Comp 667.

Warranty to Sail with Convoy.

A convoy must be one appointed by Government. Park 349.

A vessel must also sail from the place of rendezvous appointed by government - she may however sail to the place of rendezvous without convoy. Talk 443. 2 Mance 126.

These words to sail with convoy mean the whole of the voyage & not part of it. Lilly vs W. in Dong

If the convoy is to a certain latitude, say West India islands, here it does not mean that the ship must keep under convoy from the port of departure to the port of destination, for if they go under convoy to any of these Islands tis sufficient. But if the ship is to be convoyed to a certain particular place, she must not leave the convoy till she arrives at that place.

2 Bul 111.

It is not necessary that one and the same convoy should take the ship the whole distance, she may have different ones. Park 349.

The ship must have sailing orders from the commander of the convoy - tis true ship of war either may prevent this, and the commander may refuse to give them, in a like fact cases, he is excused for not obliging obtaining them. Park 393. 341. Wul 5 2 Co 164. 2 Strange 1250.

As to keeping with the convoy the ship i.e. the master is to do all in his power to keep with it and if he is lost, in such case the insurer will be liable. Garth 216. 1 Shower 320. 4 Wul 58.

The next express warranty is that she is neutral property, and if the warranty is false the policy is void ab initio.

If the property is neutral at the time of insurance tis

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Sufficient. Kennedy on P. in Dam. 37 R 477.

It has always been held in Eng<sup>d</sup> that a condemnation by a foreign court is conclusive evidence that the property was not neutral - whether this is the general law merchant I do not know says the Judge - It is not adopted in France - we have adopted the Eng<sup>l</sup> rule in this country in several cases, tho they rejected it in ~~some~~ one case in Massachusetts. 5 J R 268. or 262.

It must appear on the face of the judgment that it was enemies property. Seaw 344.

It must appear that she was condemned for being enemies property - for a condemnation on any other ground does not go to show whether she was neutral property or not. If on other grounds the insurer would be liable.

The Insurer is discharged in case of a condemnation by a foreign court.

Now this does compare to common cases where the judgment of a foreign court is not binding in another court. But the judgment of condemnation is admitted on the ground that the mercantile law governs in all countries and is not the particular law of any nation.

The rule is it must appear on the face of the judgment, have been condemned for being enemies property. The ship may be condemned on other grounds, and if so the Insurer is not discharged.

So if a neutral should not comply with an edict of a particular country, and should be condemned for this, the Insurer would be liable. It is only when they violate the law of nations and not the Decrees of a particular country that the Insurer is discharged.

The Eng<sup>l</sup> in a late case have gone still farther, for they have admitted evidence to show that the property was neutral, and thus make the Insurer liable. 7 TR 523. 631. *Benjamin vs. Molten* Eng.

I think this decision is not according to principles of law - merchants.

If it don't turn out to be neutral the Insurer is discharged ab initio. But the master and crew must do nothing which will amount to a forfeiture of their neutral character, if they do the Insurer is discharged only for what is lost after the neutrality was forfeited. So in this case he is not discharged ab initio. 4 Burr 1419. 1 B. R. 427.

When there may be a forfeiture of neutrality.

Suppose a merchant ship is bound to submit to any rule or regulation of mercantile law generally required by belligerent powers, and they refuse thus to submit, they forfeit their neutrality, and if taken and a loss ensues the Insurer is discharged. Now remark this must be the general Law merchant and not the regulation of any particular Kingdom, as the Decrees of



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France and the order of Eng<sup>d</sup>.

Now there is a great question whether a refusal to submit to a visitation & visitation and be searched by a merchant-war is a forfeiture of neutrality.

Now this question depends upon another viz whether the law merchant or law of nations consider this as a forfeiture.

Now I take it to be a ~~fact~~ fact that there never was any doubt on this subject till the beginning of our Revolutionary war, Previous to that the right of search was not denied by any country.

Now this is the consequence of another rule viz. that it is contrary to Law of nations for a ~~merchant~~ to trade in contraband goods, and if this is the case neutrals must be searched, for seems how will you ascertain whether they have such goods or not. 89 R 23.

Now if the searcher finds nothing in these cases he will be condemned for costs provided he detains the vessel and sends her into port to be overhauled, seems if he only stops her on the highway.

I will now consider the history of this subject viz. the right of search.

In the Italian law merchant, this point is laid down,

that if enemies goods are found on board a neutral, by a Belligerent they can be taken by paying the freight.

He distinguished writer in the Dutch nation lays down the same rule except that the cruiser was not obliged to pay the freight, & he says, that when a treaty says that "free ships shall make free goods" 'tis an exception to the general rule, and that exception in such cases the Belligerent ought not to quarrel.

But the ~~Swedish~~ maintains the right of visitation and search, & he says if she refuses for this cause alone she may be seized & condemned.

The French in a treaty with the Hans towns made an exception, so this exception proves the rule i.e. acknowledges the existence of it.

At the beginning of our revolutionary war some of the northern nations of Europe as Prussia, Sweden &c. contended that the law respecting search ought to be altered, that it was an infringement on the right of nations.

However there was nothing done about it till the year 1780. when they entered into a confederacy to put a stop to this practice, to this G. Britain would not accede - France acceded to it reserving the power to revoke, but she never did revoke only as it respects

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The Dutch.

It after was discontinued for a while, till the late war when  
to Nelson by the victory gained at Copenhagen broke the confederacy.

Spain and Portugal seem never to have had any thing to do with it.

But there is another question made by the opponents to this  
doctrine, admitting say they, that you may search but suppose you  
find a merchant-man under convoy, can you search her. Now tis  
clear you cannot search a convoy, therefore if a vessel is under  
convoy you cannot search it and in this way you may trade any  
where, and in any kind of goods.

But this does not affect the general principle at all.

The right of search is allowable on another ground now  
free ships must have free goods say they - Now tis clear that  
you must search in order to find whether they are free or not.

It is made a question whether any neutral foreigner has a  
right to deprive a cruiser of this power. If the ideas I  
have suggested are correct there is no such right.

Article B-3. Chap. 7. Sec 114.

Another ground of forfeiture is the sailing without proper doc-  
uments.

Ships not in possession of Documents are at all times li-  
able to seizure, for this is strong presumptive evidence against

bankruptcy - The Insurer then will be discharged.

But this want of documents is not conclusive evidence against them but it throws the burden of proof on those who are destitute of them.

Now there may be existing treaties between nations contrary to this general law and which those nations may observe.

They must actually sail with those documents since the Insurer will be discharged. 7 287 p. 5.

Beligicents often give ordinances contrary to the general law merchant; and for a refusal to obey them the insurer is not discharged.

Park 362. 358.

But it is asked cannot these ordinances have any effect? I answer yes - The insured ought to inform the insurer of such regulation as much as he ought to of any other fact - and so also the Insurer ought to inform the Insured. 3 1844 343.

### Representation.

Representation is any collateral information concerning the voyage and is made by the insured to the insurer, it is not contained in the Policy. Representation may be made by word or in writing. Now any fraud or concealment of the truth, or in fact any thing which falls short of strict integrity and honesty will void the policy.

The difference between a warranty and a representation is this,



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that the warranty is a condition of liability and must be strictly complied with whereas a representation is not a condition of liability and if true in substance is sufficient. A representation may be innocently made yet if falsely stated it will discharge the Insurer. Park 176.

A false or misrepresentation vitiates the policy absolutely. If the representation is that she is a neutral ship and she is lost in a storm still the Insurer is discharged as much as if she had been captured.

Suppose if there was no fraud and the insured should undertake to make a representation when in fact he had no actual knowledge but made it upon belief only, it would vitiate the policy, so as if he should declare that it was his belief so and so should state all the circumstances truly.

Barber vs Fletcher, Doug.

I doubt the principle in this decision in Doug.

It is an universal rule that where there are several underwriters, if a false representation is made to the first or any one of them it will vitiate the policy. Lord 787.

And any agreement with the first underwriter that he shall not be made liable will vitiate the policy. Lord 787. McDonald vs Foxon in Doug.

A misrepresentation will avoid the policy. 1 D.K. 12.

If the representation is true in substance is sufficient, and the policy will not be avoided. So where it was represented that 12 guns were to be taken and 10 guns and 4 vessels were taken, here the policy was not avoided. Lough 483.

Now this in a warranty would have discharged the Insurer.

There is one instance where the policy will remain in good if the representation is false, and this is where the policy points out the voyage, now if its represented that it will go a shorter one or less dangerous will not avoid the policy. Song 271. Park 182.

It direct concealment of facts will avoid a policy in the same manner as a false representation. 18 B 1594. 2 Minge 1183. Park 181.  
209. 10p. R 373. 409. n. 7. Shute vs Williamson. Song

Doubtful Rumours must be told as such, and not as actual information. 2 L. R. 400. n. 170.

The ordinance of any particular country ought to be disclosed.  
8 Barr 1909.

Facts of common notoriety such as are open and known to every person need not be told, so he need not tell him of the danger of the voyage nor the distance of such a place to another &c

As to particular speculations of the Insured, he is not bound to tell the insurer of them.

A Privateer need not tell the Insurer to what quarter she is

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going to cruise.

As to the state of the ship, the court have determined that to be sufficient if you state the true condition of her at the time of Insurance. Now there is no necessity for this, for there is an implied warranty that she shall be seaworthy. Lush 22p. 3 June 1905. 188543.

Of Implied warranty.

The 1<sup>st</sup> implied warranty is that the ship shall be seaworthy.

2<sup>d</sup> that the ship shall not be changed unless by consent or necessity. 3 that she shall be navigated according to law.

1. then the vessel be seaworthy i.e. the vessel be a staunch, tight ship and supplied with necessary stores, and if there is any defect as to these things, the insurer will be discharged, for his undertaking is against unforeseen perils at sea.

There may be some difficulty in ascertaining in some cases whether or the ship would not have been lost if she had been sound, even supposing free of weather. this will afford opportunity for debate.

If she was not seaworthy, whether the ignorance or the innocence of the insured will make the insurer liable, if in fact she was not seaworthy. Marshall 368.

So also where there was an agreement that she was not seaworthy, still the insurer was discharged. Marshall 369.

The owner of the goods in these cases cannot recover any more than the owner of the ship can, but he may have his remedy against the owner of the ship. occurs when he is freighted with a foreign ship.

Damages sometimes arise by entering ports without a pilot, as to liability in such cases see 7 R.R. 260.

It is that the ship cannot be changed. But if necessity warrants it, it may be done. 1 R.R. 611.

So where a ship cannot navigate well he ought to take another.

Now the Insurer must pay the expense of changing the goods &c and if there is an increase of freight he must pay it.

A implied warranty is, that she shall be navigated according to law i.e. according to law of nations or according to treaties. 8 R.R. 192.

This includes several things and 1<sup>st</sup> that she shall not deviate from the usual course i.e. there must not be a voluntary deviation from the usual course without any necessity. So stopping at such ports as it is usual to stop at is no deviation. 1 Burr. 345. 1000. 601.

A deviation does not make the policy void ab initio, for the insurer is liable to all losses previous to the deviation. 2 D. Ray 346.

It has been contended that if no injury happens by means of a deviation the insurer ought not to be discharged, but there is no decision in support of it. Beaus 315.

Case of this kind Insurance from Dunkirk to Leghorn, and the



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came across to Dover to get a Mediterranean policy and was afterwards lost. The Insurer in this case was discharged.

Another case. Insurance from Glasgow to Holland with liberty to call at Heath, but instead of calling there she called at another place where it was usual to call, still this was determined to be a deviation, and Insurer was discharged.

Now 'tis difficult to account for this decision, but I suppose the ground of it was that the liberty to call at Heath was inserted on purpose to exclude her from calling at any other port, at least the decision furnishes a principle of this kind. See the case.

It is a rule as to deviation that if there are several ports of discharge mentioned in the policy, and of course the ship is insured to such and such ports - the ship must go to those ports in the order in which they are mentioned in the policy or else the Insurer will be discharged. 6 R 531.

And if the policy says "to any ports" not naming them - they must be taken in their geographical order. So "to any port in the Mediterranean," and she went to Janney before she went to Marseilles Insurer was discharged. 6 R 552.

The general terms of allowance to enter must be regulated by the course of the trade. Marshall 397.

This deviation however is always subject to the laws of necessity.

1. Art. 35.

and nothing but necessity will justify a wilful deviation.

Recess 36.

Liberty may be given to cruise any where. 2 Shenck 1249.

as to the necessity for deviation, stress of weather is sufficient necessity.

192. 22. So also if the vessel is found to be out of repair, she may go into any port for the purpose of repairing. 1 Attk 545. Part 301.

Going out of the usual course for the purpose of getting cargo, if managed reasonably is considered as a necessary thing. 2 Salk 445. Comp 601.

A ship may also deviate to escape an enemy or to avoid a storm. Absolute compulsion may be considered as necessity for deviating as where the wariners winterize &c. 2 Shenck 1264.

After this necessity for deviating is over, or does not exist, she must take the most direct course again. Savaron vs Wilson in Doug.

What is considered a total loss.

By a total loss here is not meant an absolute loss of every thing, but the loss is considered total if the voyage is frustrated, or if the value of what is saved is less than the freight.

Sometimes there may be a total loss of the ship and not of the cargo. Damages arising from stress of weather unless it brings about a frustration of the voyage is not a total loss. So if a ship is stranded and wrecked, and the goods are not injured, still if there is no

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Ship to take these goods to the port of destination has a total  
loss, seems if there is a ship war not hard to carry them into the  
port. 2 Marten 1199. Park 63.

There is no limitation of time by which you are to determine  
whether a ship is lost or not. So if the insurer pays before it is  
ascertained whether she is lost or not it is usual for the Insured to  
give security that he will refund it provided she ever arrives.  
So if Insurer voluntarily pays the money thinking himself that  
she is lost and she afterwards returns, the money must be refunded  
if there was no security given for so doing.

If two causes of loss unite the loss is to be attributed to the more  
-direct cause. E.g. English Ship is likely to be driven by storm of  
weather under the enemy's shores, but before she gets there is  
taken by a Privateer - you must bring your action on the capture.  
Park 219.

So when a cargo of flaves started to melt they did not attribute  
it to the length of the voyage, but to the want of provisions.  
6 Park 656.

So also when a ship was insured against the perils of  
the sea, and by lying in the harbour was also by the worms  
eaten and it was not occasioned by perils of the sea. 16 Park 444.

Now when there is an insurance of the rigging &c. this is not

24 against the ordinary disease and loss of it, but when it is infected or destroyed by violence in order to save the ship and the like, there are within the policy and the insurer is liable for them.

Every thing destroyed by tempest is within the policy. So also throwing goods or animals overboard to save the ship is within it.

So also if animals should die on deck by means of a tempest, they are within the policy, so also if they die of disease or sickness.

When a ship runs by running against another vessel tis within the policy, for it is one of the perils of the sea so also if the loss was owing to the negligence or misconduct of the master and crew.

Loss by Capture. This does not involve in it the idea of legal capture, for tis no matter who takes her, whether enemies or friends, the insurer is liable as between him and Insured.

And this capture may be either a total or partial loss.

The insured may abandon the whole to the Insurer, and but if she is recaptured it may then be a partial loss only. 2 Burr 696.

338 479. The Insured cannot be compelled to abandon when there has been a capture.

If the ship is recaptured the Insurer is bound to pay all the expense of it. 1 B A 313.

Ransom Bills are now prohibited by Stat in Eng. but they are allowable by Law merchant. 3 Burr 1734.



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### Loss by Detention.

If a ship is arrested for state purposes which is frequently the case still the Insurer is liable for it.

A Detention after a declaration of war is held to be a capture & not a detention.

Arresting merchants under pretence that she is carrying enemies property - this is a capture. But if she is arrested to find out whether she has been committing any unlawful act - this is a detention. 2 Vern 176.

For a Detention by an Embargo the Insurer is liable. 4 D R 753.  
2 D Ray 646. 6 D R 425.

A capture after a cessation of hostilities is not a capture but a detention. Marshall 441.

### Loss by Barratry.

This is an injury sustained originating in the fraud or deceit committed by the master or seamen to the owners of the ship or property. There can be no Barratry unless there is fraud or deceit; negligence does not come under this head.

Smuggling, running away, going out of the coast, or committing any crime or offence which will subject the ship to forfeiture or detention is fraud or deceit, and of course amounts to Barratry. 1 Mudge 531. 2 D Ray 1349. 19 D 330.

In these cases the Insurer is discharged if this misconduct of master and mariners, was not insured against.

If a master of a ship should be owner and get insured against his own <sup>not</sup> baratry - too void. 7 M 505.

There must be an intention to do wrong. 7 M 505. 2 Strange 1264.  
63 R 379.

The owner of a ship cannot commit baratry whether he is captain or not - i.e. he cannot injure the goods. 2 Strange 1173.

There was a question made whether supposing the owner of a ship was the mortgagee he could be considered as real owner. It determined that he was the owner. Masphall 457.

If the owner of a ship charter her the person to whom she is chartered is considered as the owner. Coop. 143. 19 R 390. 7 R 39.

Insurance against baratry - he insured against the baratry of the master only in a lawful trade. The master without the knowledge or consent of the owner smuggled goods - question was whether the Insurer was liable, and the court determined that he was. 39 R 279.

There was a question of this kind whether supposing a loss happens after the voyage is at end, which loss was occasioned by

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Barratry, committed during the voyage, the Insurer would be liable in such case. The court determined that the Insurer was not liable. 19A 252.

I will now consider that loss which arises from average contribution. Average contribution takes place when any person on board or persons having goods on board a ship sustain a loss for the general safety of the ship, in which cases the owners of the ship, freight, and in short all those whose property is benefitted by the loss are bound to contribute a share to the person losing. So if horses for instance are thrown overboard for the general safety of the ship - the owners of the ship, freight, &c must make up the loss.

"Free from average" is inserted on the policy, by this is meant free from any partial loss - but not free from general loss, for then the Insurer is liable.

And this loss for the general safety of the ship and cargo is always insured against. Therefore those who contribute for the general good may recover from the Insurer. 12 Co 613.

Masts, cables, anchors &c are on the same footing when destroyed for the general safety of the ship.

So also is a sum of money paid to a Pilot to prevent his taking

the ship.

The Captain and officers of the ship are to determine when it is necessary to throw overboard for the safety of the ship, and the approbation of the master is conclusive.

If a Pirate should come on board and should merely plunder several articles, as taking a barrel of wine &c. there would be no contribution in this case.

So also if some particular goods are damaged in a storm there is no contribution, for this is not done for the general safety of the ship.

The rule therefore seems to be this, that when a loss is sustained for the general safety of the ship or if the loss contributed to other things being saved then there must be a contribution. Moore 297. Shows Par cas.

Any contribution to be made provided the end is not answered and the ship is destroyed at last. i.e. supposing the goods are not lost, shall such persons as have not lost their goods contribute? No. for the end was not attained for which the goods were thrown overboard. 1 East 220.

Case of this kind, suppose a vessel finds a bar at the mouth of a river and in order to get over it is obliged to unload part of



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the goods and put them into a lighter - now if the goods are lost in the lighter there must be a contribution, for this was for the general benefit.

But suppose on the other hand the goods in the lighter are not lost but the ship is lost - now there is to be no contribution in this case, for if the goods had been on board the ship it would not have contributed to save her.

A question has been made, whether the expenses and wages of a crew during the detention or capture of a ship was a general loss - There are different authorities on this subject - it appears not to be settled.

I should say, however that they ought to be considered as a general loss. Beauv. 150. 29 R. 407.

There are damages, no injury to the rigging &c is not a general loss, unless it is done to save the ship. 1 East 220.

Now as to what persons shall contribute. All persons who have merchandise or any thing for the purpose of obtaining, merchandise shall contribute. But mere passengers who may be supposed of any personal ornaments as jewels &c are not bound to contribute - wearing apparel and pocket money solely I suppose will not subject a man to contribution. Seamen's wages do not contribute. Wash. 466.

They must contribute in proportion to the property which they have on board.

The mode of proceeding is this - After the ship arrives the master and two or three respectable mariners go to a Justice public and make protest that such and such goods were thrown overboard or that so much money was paid to a Pirate for the express purpose of saving the ship. The articles thrown overboard must be particularized as nearly as the nature of things will admit of.

After this is done the average may immediately be made by the Captain and Officers who are to settle what the average is.

As the <sup>Insurers</sup> ~~mariners~~ are eventually liable for this loss they have a lien on the goods, stored and may prevent their being landed or taken away till average is made. Marshall 466.

But suppose the goods are taken away and there is no contribution made - how the particular sufferers may bring their actions against each one who is liable to contribute. If the sufferers are insured they may look to the Insurer for the loss in such case. Where can the Insurer in such case after he has paid recover from those who are liable to contribute i.e. will he stand in the place of the sufferer after he has paid up the loss?

But it is said a bill may be filed in favour of sufferer in Equity, to

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recover from those who are bound to contribute. Art 220.

They estimate property according to what it will sell for at the port of destination.

The mode of ascertaining what each man's share is to contribute is to have the ship and cargo valued at the port of destination delivery and then estimate the loss by the following rule. As the value of the ship and cargo is to the whole loss so is each man's particular property to his share of the loss.

### Loss by expense of Salvage.

By salvage is here meant the expense of saving, and the person who saves the goods may retain them till a reasonable sum is paid to him. This is regulated by Stat in Eng.

It is now considered that right which the Insured has to abandon his property to the Insurer.

This abandonment by the Insured is a transfer of the property to the Insurer in which case the Insurer is bound to pay as for a total loss - indeed he is treated as a total loss.

In what cases may he abandon? 1<sup>st</sup> He may abandon in case of capture. The law considers this a total loss, on the capture and if she is once abandoned then she may be afterwards recaptured still the Insurer will hold her.

If she is recaptured before abandonment it is then a partial loss generally - but it may in that case be a total loss if the voyage is

26. frustrated on the salvage is less than the freight it will be so considered even if the news of capture and recapture arrives at the same time.

After abandonment is once made it will remain and neither Insurer nor Insured can break or destroy it. 2 Burr 696.

Abandonment may be made at any time during the capture.

2<sup>d</sup>. Insured may abandon if the voyage is defeated. & any profits which have taken place sufficient to frustrate the voyage, as by throwing &c is sufficient. 30th 175. 2 Burr 683.

If a captured ship is ransomed there is a partial loss. 2 Burr 1193.

13th 276.

Suppose a ship on her voyage gets into trouble and is obliged to put into port and should there sell all her property, ship, cargo &c being unable to go any farther - now this is a total loss and the Insured may abandon - to a total sale after recapture - the Insured may abandon. Mills vs Fletcher in Doug.

3 Insured may abandon in case of ship wreck. This is upon the same principle as the last. If the ship is wrecked and the goods should remain, still it would be a total loss, provided there was no other way ship ready to carry these goods into port.

But if a ship is thus ready and does carry them to a partial loss.

so if the ship is stranded and there is no very great damage done to a partial loss and he cannot abandon. 13th 157.



Abandonment.

There is no established rule to determine when the salvage is more than the freight. Park 166. 5 Bro Par cas 1911.

If the voyage is frustrated by accident or storm the loss is total, unless there is a ship to convey the goods to the place of destination.

The principle adopted here is, if the damage does frustrate the voyage the law will consider it as a total loss tho in fact it is partial. Park 116. 2 Bur 693. 2 Strange 1065.

As to when the abandonment can be made, the time is in some countries fixed but the common law merchant has fixed upon no certain time.

The rule seems to be that the insured must abandon as soon as he hears of the loss i.e. he must inform the insurer within a reasonable time after he becomes acquainted with the loss. 1 Ark 608. 680 Park 172. 8 D R 268. 2 D R 470.

Notice of abandonment may be given either by parol, or in writing, both are good.

The law does not require any particular form for this notice but only that it be explicit. Conversation on the subject merely is not sufficient. 1 Esp. N 12.

It is sufficient if notice is given to the agent of the insurer. Park 177.

or 172. The insured can never abandon a part when they are contained in one entire policy. The whole in such case must be given up or none at all. But part may be abandoned if the goods be insured in separate policies - & also part may be abandoned if they

intimately valued in the same policy.

The abandonment must be absolute and not depend on any contingency or condition. Marshall 578.

The abandonment is viewed as a transfer to the insurer, therefore where there are a number of insurers they are held as tenants in common without any respect to priority.

In general I believe the freight is not transferred by the abandonment the in pure countries it is.

The Insured do not abandon all their own interest in all cases. If the cargo is valued at £5000 and only £4000 have been insured against; in this case if there is an abandonment the Insurers are entitled to one fifth of what is saved, but they are tenants in common with the Insurers.

Where there is a bottomry bond the lender when an abandonment is made is only entitled to his share of the property saved as tenant in common. But in France Havre towns and other places the lender is considered as mortgagee and to be entitled to his whole money, but if there is sufficient saved.

A ship and cargo are worth £1000 each, specifically worth £5000. At insurer £3000 upon the ship. B. £3000 upon the cargo, and C insures £4000 more upon the ship and cargo. The ship and cargo are to be abandoned £1000 is paid clear. Insurer upon the ship A must have  $\frac{3}{5}$  i.e. £3000. B insurer upon cargo will have £300 and C insurer

er upon ship and cargo must have £300 more they must have upon the ship £150. and upon the cargo £150 and this is equal to £300. The insured will then have £100 as there was £1000 they did not get insured. 1 May 78.

If a ship is abandoned and it afterwards arrives safe, if the abandonment is made on false grounds, as that there has been a capture or upon a report that the ship has been lost when it was not; in such case the abandonment will not bind the Insured but will be void, but if the abandonment was made on good grounds it is absolute and binding.

A ship was insured from L to L she was lost and abandoned but afterwards several bunks of money were fished up - still it was held that the loss was total and the insurers would have the property saved, and from this case we may infer that no subsequent events can make it a partial loss. 4 June 1766.

The insured are bound to save every thing they can before the abandonment is made. So after the abandonment is made the Captain and business must endeavour to save all they can, they are then considered as the agents of the Insurer - and if the Captain is guilty of neglect the insurers will have the loss made up in consequence of this neglect. The Captain has an implied power in case of necessity to procure another ship to carry the goods to port of destination, he also has power to sell the ship and cargo if he deems it necessary and vest the pro-

direct of their goods in other goods run into them by another ship to the port of destination since their own goods are covered by the policy  
Notes on Marine Insur. 1861

Shippers are bound to exert themselves to save what they can, if they do not they are not entitled to wages, and the Captain and Officers are to determine whether they are entitled to them or not.

### Regiment of Losses.

The Insurers are to pay the loss. If the loss is total they must pay the whole. If the policy is valued and the loss is total they must pay the value. If the loss is partial and the policy is valued or open then the value must be settled.

And the rule is to take the prime cost of the goods and not what the goods would have been sold for.

If the loss is total on an open policy the prime value and premiums, and other necessary expenses are recovered. The ship is valued at her worth when she sailed, adding to it the necessary expenses in repairing her upon the voyage.

If there is a partial loss we suppose there are 10,000 of sugar prime cost £40 per hhd injured some but sold for £40 - if not injured it would have been sold for £50 per hhd. The rule is to have reference to the prime cost. The loss is one fifth, but the loss is one fifth of the prime cost. If the rule was to take one fifth of what the goods would have been sold for, the loss would be £100 but the rule is to take  $\frac{1}{5}$  of the prime



### Insurance.

cost, so the loss is £ 60. 2 Burr 1167.

Suppose a partial loss in a valued policy, the rule is the same in adjusting loss as in an open policy. Marshall 541.

When the adjustment is made, the underwriters sign it. Beavrs 310.  
Pick 118.

### Return of the Premiums.

If there has been no risk run the premium must be returned. So when the contract is void ab initio, the premium must sometimes be returned and sometimes not.

If a person supposes he has goods on board, and gets them insured but when the ship arrives, he finds they were never put on board. the premium must be returned and if part of the goods were put on board, the strict rule of equity governs and a proportionable part of the premium must be returned.

According to Butler if one employs another to do an illegal act, and gives him money to do the employer may recover it back if the thing has not been done.

So if there has been a premium given upon an illegal insurance, if the usque has not been run the premium may be recovered.

3 M 116. Lowry vs B in Doug.<sup>2</sup>

But this is not the case at present the premium in such case cannot be recovered now. Judge Reeve thinks the decision by Butler was not upon good principles, and that it has been overruled.

If an insurance is made without interest, and the premium paid, the Insured shall not recover back the premium after the ship has arrived safe.

If a prize is supposed to be taken and the Captain gets the prize ordered to enter safe in port and it happens the ship taken is no prize, here the premium cannot be recovered. 33 R 152 & 155 ant 158.

This is the only case where a premium cannot be recovered where no voyage has been run, and no fraud practised.

Where there was an insurance from A to B and the insured received any goods on board and no voyage being run the premium was recovered.

The principle then is this if the Insurance is void at its origin without fault or crime the premium is to be returned except in the case of the capture of a supposed prize; but if the insurance is void at its origin through the fault or crime of the party the premium cannot be recovered.

If there has not been a compliance with the warranty, & there is no fraud the premium must be returned if no voyage has been run, But if there has been any fraud practised although there has been no voyage run yet the premium shall not be returned, tho the rule was formerly held to be different. 2 Burr 206. 2 R 444 ant 351. 3 Burr 1364. Park 218.

So also the premium must be returned when the voyage is given up for there is no voyage run.

### Insurance.

The principle is where there is no risque the premium must be returned. However if want of risque arises from any illegal i.e. fraudulent conduct of the insured, the premium cannot be recovered back again; and this is founded on a principle of policy. There are however very few of these cases which are not mixed with some risque.

It is a general rule if the risque has once begun the premium is not to be returned. There are cases however where there is an apportion<sup>tion</sup>ment made, and here the court endeavours to make a distinction between two distinct voyages.

Here I am of opinion says the Judge that there can be apportionment are founded on particular usage of some trade, and that according to the general law merchant after a risque has begun to be run no apportionment can be made. But if in fact there are two distinct voyages then apportionment can be made.

3 Burr 1237. Wad 772.

Insurance at and from J, to sail at or before a certain given day. Now it is said here are two distinct voyages, but the court<sup>d</sup> there was not satisfied 568. contra 587. but in this last case they proved a usage. Look 666.

There are sometimes stipulations entered into by the parties that upon the happening of a certain event part of the premium shall be returned.

Some cases have arisen under these stipulations

see *Simons vs Lloyd*. Lang. 7 PR 421. 22 Feb 11.

It is a rule that if the insured puts an end to the risk, the insurer may retain a certain proportion of the premium as a reward for his trouble. However insurer, cannot thus retain if the insurance was upon an illegal trade.

Courts of com law have jurisdiction in all matters relating to this title 10th 457. 220 359. 3 Bro P.C. cas 525.

Most of the disputes arising from this subject are settled by the merchants themselves.

It has been decided that a clause in the policy which says that if any dispute arise it shall be settled by arbitrators, is void and does not oust the jurisdiction of a court of justice. 2 Burr 1042. 10th 129. But if so submitted, and an award is made this is conclusive and will bind.

### Bottomry and Respondentia Bonds.

Bottomry bonds were introduced to enable men who had not money sufficient to fit out a ship, to borrow money on great interest, and pledge the ship as a security for the payment of it. If the ship is lost by any of the perils mentioned in the policy, the lender loses his money.

The same rules and principles which govern in Insurance govern here.



Insurance. Bottomry &c bonds

Respondentia bonds are of the same nature as Bottomry bonds only the loan is on the goods and merchandise, and the borrower is himself personally liable for the payment of the money.

Suppose in case of Bottomry bond no risk is run - the voyage being given up &c in this case the lender is not entitled to his interest but to his money only.

In case of a partial loss the whole of the Bottomry bond must be paid, sec in Insurance.

The Captain has an implied power to take up money and pledge the ship in case of necessity. Marshall 639.

As to the effect of giving up a voyage in case of a Bottomry bond see 16 Vin 268.

After the ship arrives the interest is legal till the money is paid. Marshall 649.

That no partial loss can effect the bond see Marshall 652.

But the ship may be lost and yet the lender will recover his money - and this is when the fault is in the borrower or his agent. E.g. ship is not seaworthy - she is lost by smuggling - in this case however lender in order to recover must not be party to the smuggling. So also a deviation from the voyage will entitle lender to recover. Skinner R 152.

So also if the ship is changed without any necessity.

In some countries 'tis true that in these cases the bond is dispensed

but is not in England. Marshall 652. Park 423.

Is common to have these bottomry bonds insured. Park 423. or 223.

So in case of Respondentia bonds, if part of the goods are lost, it does not effect the bond.

Contracts by Charter-parties.

This is a covenant either in writing or by parol, entered into by a merchant or merchants with the master of the ship, or with the owner, respecting the freight, or it may be for the use of the ship herself.

It is a rule in these contracts that if there is so much given outward and so much inward, and she is lost before she arrives at the port of destination no freight shall be paid - but if she is lost on her return home then the outward freight must be paid. 1202. 236.

If no freight is to be paid till she return and she is lost on her return, no freight must be paid either outward or inward.

It is an established rule that freight is always due at the point of delivery, and if paid beforehand and she is lost it must be paid back again - therefore the master has a lien on the goods till he is paid.

Now if there is any default of the master, that is ground of loss and he will lose his freight. E.g. if he return home without without any loading of owing to his own fault - seems if it was owing to the merchants agent.

### Charter Parties.

If the ship is disabled, the master has it at his option to refit or to hire another ship and proceed. 2 Burr 582.

Every merchant who loads a ship with goods has the power of abandonment and a total loss or destruction of them will free him from paying any freight.

And if there is a partial loss he may abandon if the salvage is not worth as much as the freight. 2 Burr 582.

The master is liable for all damages done to the goods by means of his negligence &c. So if he sails with a leaky vessel &c. they may come upon the master and owners both for the damages.

Hardw 55. 194. than 1251.

They often add a penalty to these charter parties. 30th 555.

The rule is when there are a number of owners, the majority of interest shall direct the voyage. 6asth 27.

If the master buys provisions for the ship, the owners are liable for them, tho' the master himself may personally be liable. 2 Burr 643. Hard 376. of mariners

It is a rule in all countries that if mariners create an open debate they are to be put on shore and to lose their wages & goods. The captain is to determine in all cases.

It is made a capital crime and punishable with death, to conspire to force the ship out of her voyage.

The mariners are bound to stay on board till the ship is

24 unloaded and the tackle is taken down. They may be made to act as Porters but for this they must be specially paid. If they refuse to act as porters they may be deprived of their wages.

They are entitled to their wages at the port of delivery and any agreement to the contrary is not binding. In the United States an agreement is made binding by Statute. 20 am 728.

If the ship is lost the wages are lost. 1 Doop. 179. 3 Burr 1844.

Mariners lose their wages by joining a rebellion &c It is also if they do not assist in saving the goods when the ship is likely to be lost.

The mode of proceeding on the death of one of two joint-Merchants as to the claims in favour, and against the Company.

Now in all cases of joint tenancy, except that the property be jointly incurred in case of the death of one of the joint tenants.

If A and B are joint merchants and B dies his property descends to his Executor, and does not survive to A.

But the right of collecting survives to A, and you cannot bring a suit against <sup>the</sup> Executor, you must bring it against A alone.

Every other right except that of suing is in the Executor.

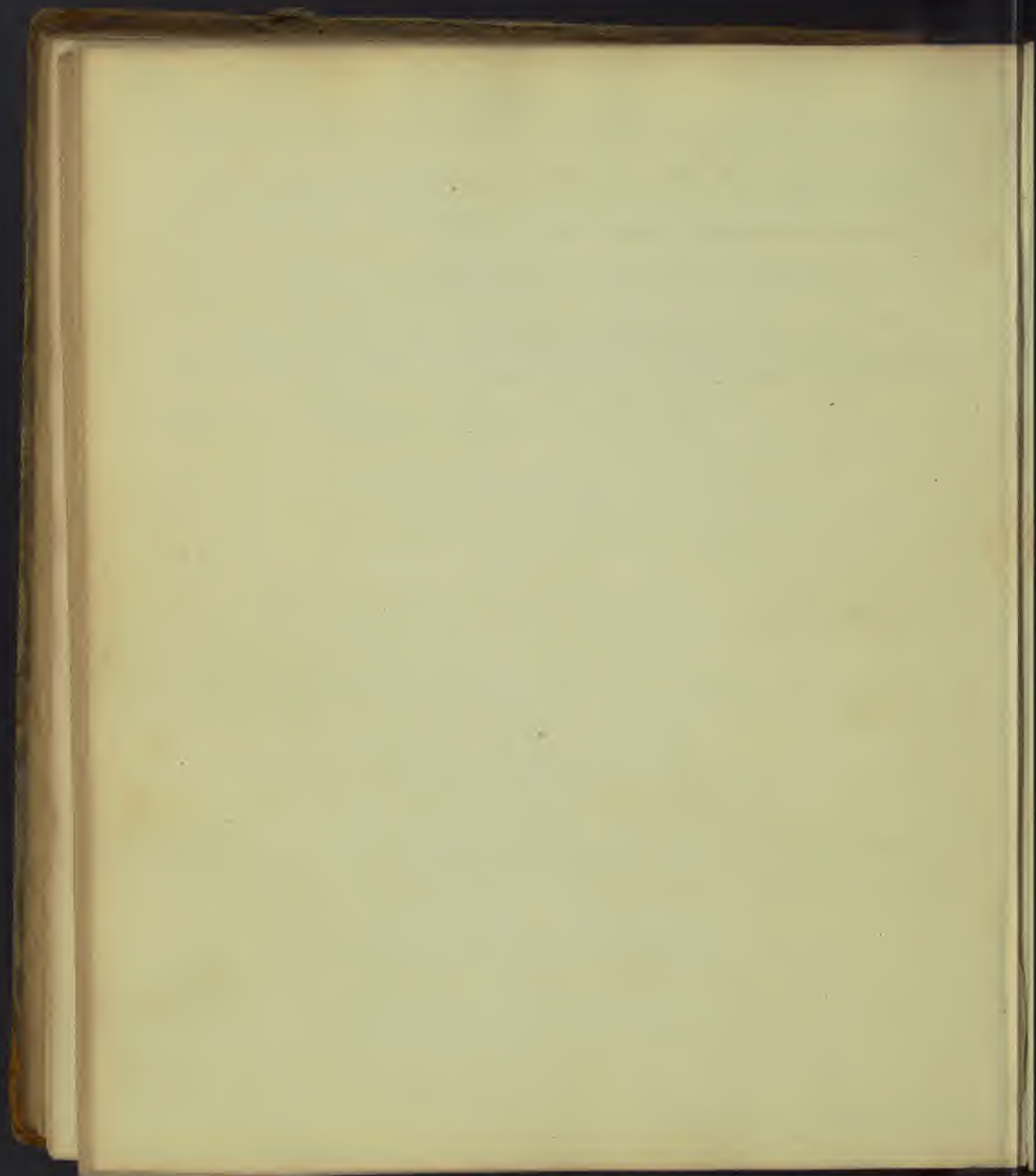
But suppose it is a Bankrupt and unable to pay the debt and B was a man of property, here in this case B's Executor may be sued, but it must appear on the record that it was a Bankrupt and unable to pay the debt. 2 Ves. 265.



Maritime law.

There are certain cases in which contracts may be rescinded among Merchants, which is unknown to the Com. law. This is called stop-  
ping in transitu. E.g. Suppose one merchant sells goods to another,  
and before they are delivered to him, he discovers that the buyer is  
in failing circumstances - here he may stop the goods and this  
vacates the obligation and revivies the contract. But the seller  
does this at his peril.





## Public Wrongs.

The principles of this branch of the law are so simple that I shall give you very little but what may be found in the elementary books. This is the most simple branch of municipal law.

That branch of municipal law which treats of Public wrongs, is called Criminal law, Crown law, and Pleas of the Crown which appellations are synonymous.

Public wrongs include all offences against the law.

A crime or misdemeanor consists in the commission of some act prohibited by law, or in the omission of some act commanded by the law.

Crimes and misdemeanors are synonymous terms.

Crimes or misdemeanors differ from private wrongs in this - that crimes are an infraction or violation of some public right inherent in the community, and private wrongs are an infraction or violation of the right of an individual considered as an individual. 4 B. & S.

In almost every case a public wrong includes a civil injury. E.g. battery, libel, theft, &c.

But it does not include one in every case. E.g. a public nuisance may have been owing to my house but still be a public nuisance.

But as generally a public wrong includes a private injury, &c.



Criminal Law.

the object of the law to give a twofold remedy - one for the public wrong and the other for the private injury.

The party affected by the crime is to prosecute the remedy. So in case of battery, the King in a monarchical government, and the People in a popular one, prosecute for the public wrong, & the party beaten, hereafter, for the private injury.

There is a material difference between the act and the offence. The act is the thing done & the mere action. The offence is usually, the character which the law affixes to that act.

Hence one act may constitute many different offences, and so one entire offence may consist of many acts.

E.g. So if A should strike B ten blows in succession - how all these acts being committed in continuity constitute but one offence.

The civil injury and the public wrong are distinct.

If the public wrong amounts to felony, the private included in it, is merged in the public wrong, and the individual has no remedy. 4 Blum 5. 6. But ch. D. 131. 2 Roll 57.

This doctrine of merger has been variously accounted for. It is said by some to be founded on the policy of the law in order to bring the offender to punishment. But I see no reason for this rule. 3 F. R. 176.

But the true justification of this doctrine seems to be that the punishment which the law inflicts for the public wrong,

renders it impossible for the offender to satisfy the party injured. For as the body and property are the only means of making satisfaction, and these are both forfeited in case of Felony to satisfy Public justice, nothing remains to satisfy the civil injury. This seems to be the true doctrine of merger. 2 Strange 873. 2d Rep. 1572.

But if the crime does not amount to Felony the individual has his remedy by a civil action as there is no forfeiture here.

In consequence the doctrine of merger has never been regarded in any case. Civil suits have been sustained here for Assault, Burglary, and I believe for Perjury, and the reason of this is that here there is no forfeiture of property.

Forfeiture occurs in two cases only in Connecticut. 1<sup>st</sup> For destroying a Public magazine, and 2<sup>d</sup> for manslaughter. These are provided for by Stat. of Connect-1792, 185. 285.

But in neither of these cases is the life of the offender taken.

In a case of this kind in Connecticut. A brought a civil action against B, and procured judgment against him for satisfaction of Perjury by procuring a witness to perjure himself, here the Deft in the former suit brought an action against A for the civil injury, but the Court determined that the action could not be sustained because it would impeach the former judgment.

Bostwick vs Lewis.

Thus far of the general nature of crimes, as

Criminal law.  
contradistinguished from private wrongs.  
Of the nature of punishments.

It seems to be agreed that the right of punishing for crimes is founded in the law of nature and this right in a state of nature vested in every individual tend to deprive individuals of this right is to destroy the sanction of the law.

In a state of society this right is transferred to the sovereign Power. Society's right to inflict punishment is from the consent of its members and supposes a compact.

But this notion of compact will not authorize punishment in every case. So in case of positive offences or those created by positive laws, not against the law of nature. Here the right of punishment is not derived from the consent of the members, because they never possessed these rights. 2 Boucher 149. Paley 341.  
Waller Lect. 74.

This theory is of but little practical use. But I conceive the true and rational right of inflicting punishment in any case is founded on necessity or general expediency. Men were formed for society and never can exist without it; but society cannot exist without a right to punish offenders. Paley M.P. 349. 17 Hale P.C. 3. 4 B69.

The end or final cause of human punishments is the prevention of crimes and this is effected in three ways. —

2

1<sup>st</sup> By such a kind as will tend to reform the offender.

2<sup>nd</sup> By deterring others by the dread of his example from offending in the like way.

3<sup>rd</sup> By depriving the party injuring of the power of doing future mischief.

I will now consider what persons are, & are not capable of committing crimes - and the general rule is that all persons are liable for disobedience to the laws of their country except such as are expressly exempted. 4 B.C. 20

All the excuses which protect the committer of a crime from punishment may be reduced to this single consideration, the want or defect of will.

Every person has physical power to do an act, but to constitute a crime, the will must concur with the act.

The rule is different in civil injuries, for the intention here is not considered. 4 B.C. 20.

Now there is a defect of will in three cases - 1<sup>st</sup> Defect of understanding - Hence infants under the age of discretion are not punishable for any crime whatever. Criminal law punishes guilt - civil law gives damages. 1 Hawk P.C. 1. 4 B.C. 22.

Is a general rule of com law that if the crime consists in an omission an infant tho of years of discretion is generally not punishable. This rule proceeds upon the ground that an infant has not



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the command of his person or his property. 1 Hale 20. 4 B & 22.

The age of legal discretion is 14. Under that age he wants discretion. But at 14 and over he is liable the same as an adult i.e. want of age does not excuse him.

Under 14 the presumption is in favour of Infants. But between 14 and 7 in capital cases this presumption may be rebutted. - Whether it may be rebutted in other cases is not clearly settled in the books, but from what Justice Blackstone says on the subject it would seem that it cannot be rebutted. 4 B & 23. 1 Hawk P.C. 2. 1 Hale 27. 25. Foster Ed. 72.

An infant under 14 cannot be punished for crimes and misdemeanors not capital. Under 7 he is not a subject of punishment, and this presumption can never be rebutted. Idiots and Lunatics are not punishable while under this incapacity. But if a Lunatic commits a crime in a lucid interval, he is punishable. 1 Hale 10. 61. 1 Hawk 2. 4 B & 24.

It was formerly supposed that deaf and dumb persons were not punishable for crimes. But it is now settled that these persons may be tried and punished if it can be made to appear that they were capable of receiving ideas by signs. Leach Cases 106. 394. 1 Macd 158. 2 Hawk 462. 4 B & 324.

On the ground <sup>that</sup> of want of understanding will excuse a man from

Punishment - It is clear that if a man becomes insane after he has committed a crime, he cannot be arraigned, and if he becomes so after he is arraigned he cannot be tried, and if after trial judg<sup>t</sup> cannot be pronounced, and if after sentence is pronounced he cannot be executed. Whether he is insane or not must be tried by a jury.  
 1 Hawk 2. 4 B & 395. 24. 1 Hale 39. 370.

And upon the same principle he who incites a mad man to do an unlawful act is himself the offender he is, an accessory but principal, for a mad man has no will but is mere instrument. 1 Hale 617.

Keeling 5 B. 4 B & 35

But a want of will arising from voluntary intoxication will not excuse an offender. he may excuse himself from a forbidden act, but Town of offence says 4 B. 4 that a weakness or habitual debility of mind brought on by a long course of intoxication would excuse him.  
 Hawk 19. 4 B 125. 1 Hale 32. 1 Hawk 2. 60 447.

Now I consider this debility as a consequence of disease and this we can terminate in the want of understanding.

But when this intoxication is not voluntary but occasioned by force or fraud, the want of understanding will excuse from punishment. I have thus far treated, when the defect of will arises from a defect of the understanding.

But there are cases where the will is neutral, and tis a general rule that if one commits a crime from chance or accident, it will excuse

him. Cases of this kind in homicide.

But if a man commits an unlawful act voluntarily, he is liable for an unintentional injury. 1 Hawk 5: 1 Hale 420 424. 124  
Holding 128.

So ignorance or mistake in point of fact excuses on the ground of defect of will. So if it should break open B's house thinking it was his own, he would not be liable criminally, but civilly only.

But no man can ever overcome his ignorance of the law, this will never be permitted, because tis the duty of every man to know the law & also because tis impossible.

Now the reason why ignorance in point of fact excuses, and ignorance in point of law does not is that in a mistake in point of fact the will does not concur with the act but in point of law it does. How 343. Reg 457. 1 Burr 35-1 Hale 421 1 Hawk 110. 5. 124 125 128.

There may be a defect of will arising from compulsion or necessity, here the will does not approve of the act. 1 B. & C. 27.

A married woman is in many instances excused from punishment by the coercion of her husband - and the rule goes so far that if she commits a crime in the presence of her husband she is excused and the husband is liable.

If she commits theft or burglary by the coercion of her husband, she is excused, but if she does it voluntarily or by his command alone, she is not excused. 1 Hale 10 mod 63. 4 B. & C. 28. 96 71.

But in case of treason, murder and high treason, robbery, the is not excused even if the is coerced. 4 B & C 29. 230. 241.

In the case of manslaughter a woman is not excused on the ground of marital coercion. B & C 29 n. 7. Christian notes. 1 Hawk 4.

But a child is never excused by the command of his parent, nor a servant by the command of his master. 1 Hawk 3. 3 Fost 34. 3 B & C 34.

In some cases there is a kind of compulsion working a defect of will that will excuse an offender - as where one commits an offence under duress per minas. But this will not excuse all offences. 4 B & C 30. 1 Hale 50. 1 Hawk 5.

But this last rule holds true only as to positive offences & not as to natural ones. 4 B & C 30. 1 Hale 51.

Another species of necessity arising from a legal compulsion where the will is passive. So if an officer is obstructed in doing his duty he may use all necessary violence to perform his duty. Here he acts in pursuance of a duty which the law imposes on him - the law does the act by him. 1 Hale 58. 4 B & C 31.

It has been a question whether a man can excuse himself for stealing in case of extreme want or necessity, but it is now settled that he cannot on principle of com law which provides in all cases for the poor. 4 B & C 31. 1 Hale 54.

As two or more persons may be concerned in the commission of a crime the law has established a difference between Principals & Accessories.



One may be a Principal in two degrees - one in the first degree is he who is the actor or actual perpetrator of the offence. A principal in the second degree is one who is present aiding and abetting the actual perpetrator. The books do not all agree in this distinction, but I believe I have given you the correct one. 4 Blk 34. Hale 615. How 97. 2 Hawk 441. 258. 326. Doug 197.

This distinction is not the same as it formerly was. 2 M. Selly 523. Hale 539.

I have remarked that a principal in the 2<sup>d</sup> degree is one who is present &c but this need not be an actual presence nor within hearing or sight - a constructive presence is sufficient. So if one stands as a guard or a spy, this is constructive presence, for he is assisting the other. Foster book 350. Doug 197. 2 Mack 7. 529.

And for the purpose of punishing a person for assisting or abetting in any offence it is not necessary that the actual perpetrator should be knowingly known; tho the usual form of the indictment would seem to make it so. Leach 29. 2 Mack 534.

This distinction holds in cases of Felony created by Stat. as well as in those created by Common Law. A Stat felony is subject to all the incidents which accompany a Common Law felony. 2 Mack 525.

It is not universally true that a constructive presence be proved to make a principal in the 2<sup>d</sup> degree - it can only apply when a principal of the 1<sup>st</sup> degree must be present.

It is not necessary that a principal of the first degree be present

when the wrong is committed, as in case of poison, and of letting  
 loose furious beasts. 1 B & 34. Keeling 52. Foster 349. 2 Hawk 448.

36 44.

But it is indispensably necessary to make a principal in the 2<sup>d</sup>  
 degree that he should abet and assist in the wrong, and hence if  
 a special verdict is found that the prisoner was present, judgment  
 cannot be rendered against him, he must assist. Keeling 77. 4 B & 2073.

2 Hawk 527. 5 B.

An accessory is one who is not the chief actor in the offence, nor  
 present at the commission of it, but one who is some way concerned  
 in it either before or after the fact. So he must not have been present  
 to constitute an accessory, for that would have made him princi-  
 pal in the 2<sup>d</sup> degree. 4 B & 35.

There are some offences which do not admit of this distinction, but  
 generally there may be Principals and accessories in felonies, but there  
 are some exceptions. In High treason all are considered as principals.

1 Hale 613. 12 Co 81. 1 Inst 57. 4 B & 35.

It is to be generally true that whatever will make one accessory, in  
 felony will make him a Principal in High treason, and this whether  
 before or after the fact. 1 Hawk 58. 2 do 439. 12 Co 81. Eyre 296.

There may be accessories in Petit treason and murder and generally  
 in all those cases where the crime was facilitated. But in murder

criminal law

Slaughter there can be accessory after the fact only.

In Petit larceny there can be no accessory the law therefore admits of no accessories in the highest nor in the lowest offence, for the law will not stoop to discriminate between them. 4 AB 36.  
20 191. 2 Wash 441.

The guilt of an accessory follows that of his principal he cannot therefore be guilty of a higher crime than his principal.  
1 Wale 615. 1 Wash 132. & 20 445.

Accessories in crimes are of two kinds 1. accessories before the fact; 2. accessories after the fact.

And accessory before the fact is one who procures, counsels, or commands another to commit a crime, he must be absent at the time of the fact committed & so he will be a Principal. 2 Wash 445.  
1 Wale 615. Mum 475.

And he who procures another to do an unlawful act, is accessory to all that ensues upon the commission of the act, but he is not liable for any thing which does not ensue directly from it. So if A procures B to beat C and C dies of the beating. A is accessory. Mum 475.  
Porter L. d. 371. & 20 37. 2 Wash 441.

It renders one accessory in a felony to accessory that the crime be committed. But it would follow from Ward cases that to solicit one to commit a crime is a misdemeanor tho the act is not done. 2 East 55.  
3 do 581. 50 Ray 137. 2 Mum 1. & Ward 101.

4

So if one request another to commit a crime, but before the committed he retracts, but while the act is committed, here the one requesting would not be an accessory, as it was not done by <sup>his</sup> request. Still he would be liable for a misdemeanor for soliciting the offence. Ann 475. Foster

2 Hawk 445.

That felonies admit of accessories tho the Stat is silent as to them. Leach 64.  
1 Hawk 164.

But the bare concealing an intended felony will not make an accessory. A person so concealing is guilty of misprision of felony which is punished at Com law by fine and imprisonment. 2 Hawk 447.

4 B & 121. 1 Hawk 127.

And tis a general rule that all persons who are present when a felony is committed and do not endeavour to prevent it to the extent of their power are guilty of a misdemeanor. Now the law does not require impossibilities in this case. It does not require a man to expose himself to imminent danger.

It must appear to the jury that they were competent to prevent it, in order to make them liable.

Exception in case of infants, they are not liable in such cases, as they are not liable for crimes of omission which I have before observed.  
2 Hawk 442. 115.

"Accessory after the fact is one who receives, relieves, comforts, or assists a felon knowing him to be such."



Criminal law.

This definition of libelally construed would take an accessory as  
which are not accessories. It must be such assistance as tends to  
prevent him from being brought to justice. So bestowing charity on  
Nelson and even knowing him to be such does not make one an  
accessory if it is not done with an intent to prevent him from being  
brought to justice. 1 Hawk 145. 104. Hiding 45. 77. 4 B & 35.

The buying and receiving stolen goods of a felon did not make an  
accessory at common law. But now by Stat they are made accessories after  
the fact, but Stat makes them principals. The person buying must  
know them to have been stolen. 2 Hawk 451. 4 B & 35. 60 & 358. 9 Geo 4.

Part of common law theft.

But in order to constitute an accessory after the fact the crime must  
be completed before the assistance rendered. 2 Hawk 451. 1 Hale 219. 622.

But a married woman is excused by assisting her husband to escape  
and the reason of this is she is supposed to act under his coercion.  
But no other relation excuses. Parent cannot assist his child, nor child  
his parent, and so of master and servant.

Neither can a husband assist his wife. 2 Hawk 451. 1 Felt 4 B & 35.

In the prosecution of an accessory it has been decided that where  
one has been indicted to have been accessory to two principals, proof  
that he was accessory to one is sufficient to support the prosecu-  
tion. 2 Hawk 454 & 42. 96 119.

I think I should doubt the principle of this rule says Mr G.

is a general rule of com law that an accessory shall suffer the same punishment as his principal.

But benefit of clergy is allowed to accessories after the fact by Stat. 1 R. 639.

It was formerly holden that an accessory could not be tried till after the principal has been convicted. But the rule is now relaxed the accessory may be tried at the same time with the principal, and the law now stands that an accessory shall not be tried so long as the principal remains liable to be tried hereafter.

2 Hurdw 153. 455. Leach 18. 4 B & 40. 323.

In Eng<sup>d</sup> there are two Acts providing that an accessory in certain cases may be tried even tho his principal has not been attainted or even tried. He is liable to be tried only for a misdemeanor and not as an accessory under these Acts - the rule of com law still prevailing. 2 Hurdw 453. 4 B & 323. Leach 107.

353. If the principal is tried and acquitted the accessory must of course be discharged, and this rule is pursued up through all its consequences.

So if judgment is reversed against the principal it is impossible ifso facts reversed as against accessory. 2 Hawk 452. 1643. 96119.

The death or pardon of the principal after attainder at common law does not avail the accessory.

But at com law the death of the

General law.

Principal after conviction but before attainder discharges  
the accessory, for there is no certainty of guilt till judgment is  
passed. 2 Hawk 483. 4 B & C 23. But the common law in Eng<sup>d</sup> is now  
altered by Stat of Anne. 2 Hawk. sec 110.

If a person has been acquitted on an indictment for accessory  
he may be afterwards indicted as principal both before and  
after the fact.

But if one has been acquitted as principal whether he  
can be indicted as accessory before the fact is not settled.  
But if after the fact is settled he can. 2 Hawk's 30. Keeling 25.  
4 B & C 40. Foster 361. 2 Hawk's 29. 2 Mack 496.

In an indictment against an accessory tis not necessary  
to allege that the principal committed the offence - tis  
sufficient to allege that he has been convicted. 7 J R 465.  
2 Mack 474.

But tho the accessory cannot be tried till the attainder  
of the principal yet this attainder of principal is not  
conclusive against the accessory and not even against the  
principal, for he may have been convicted contrary to law. -  
2 Hawk 456. Foster 121. 365. 2 Mack 464. 96 118.

And the same indulgence is allowed to accessory when both  
are tried together.

I have thus far treated of crimes in general. I now

5. now to consider particular crimes, and 1<sup>st</sup> of Felony. Felony is any offence which occasions at law a total forfeiture of goods or lands or both. The term Felony is generic it does not specify any particular offence. 4 B & G 44.

It seems this term originally denoted the penal consequence of a crime - hence it has been used to denote the forfeiture. Treason is strictly a Felony because it works a forfeiture. But it has long been classed as a crime by itself, it is not called a Felony.

3 Inst 15. 4 B & G 4. 78.

According to this description of Felony capital punishment is not of course a consequence of felony - this is almost always superadded. And on the other hand there are capital offences which are no felonies as Beryng - standing mate &c which were punished with death tho there was no forfeiture either of goods or lands. Bardon 114. 146. 4 B & G 95. 97. 237. 2 Inst 19. 120. ok 208.

All felonies which are capitally punished work a forfeiture of all goods and lands, and those which are not capitally punished occasion only a forfeiture of Goods. Reason of this seems to be that attainder is necessary to work a forfeiture of lands. Co Litt 391. 4 B & G 97. 299. 381. 387.

By general usage felony is now made use of to import a capital offence or crime, as capital punishment was almost always



## Criminal law.

Superadded.

Felony includes all capital crimes below high treason. So if a Stat enacts that any given act shall amount to a felony it is understood that the offence shall be punished with death.

So also if a Stat enacts that any given crime shall be capitally punished that crime or offence is a felony. Hawk 168.  
Male 624, 641, 703. Holt 293.

Crimes which in Eng<sup>d</sup> are called Felonies are called Felonies here in Connect. tho there is no forfeiture. Treason, Robbery and Burglary &c are called Felonies here, tho they occasion no forfeiture. Exemptable Felonies are those in which the benefit of clergy is allowed. It is a species of pardon which exempts Felons and those convicted to death from capital punishment, tho it does not prevent the forfeiture of goods.

For a more particular account of this subject of benefit of clergy see the Elementary writers. This title is wholly unknown to the laws of Connect, and I believe to all the States.

## Homicide.

Homicide is the killing of any human creature or his man killing. There are three kinds of Homicide - justifiable, excusable, and felonious. Any species of homicide consists in the killing of some human creature.

Homicide is therefore not necessarily criminal. So of justifiable homicide - the law annexes no degree of guilt and in excusable homicide the law affixes very little punishment. There appears to be only a nominal difference between justifiable and excusable homicide. Porter 253. 2 Ward 537. or 539. 100 108.

Justifiable homicide is of several kinds. It is justifiable -  
1<sup>st</sup> when occasioned by necessity - so a Sheriff or his Deputy is justified in executing a criminal sentenced to death for he acts under the authority of law - he is a messenger of the law.  
4th Ed Hask 105.

To make a justipfection in such case the law must require the act to be done and the person to do it and no other person than the law requires as the Sheriff or his Deputy. can do it.  
436 178. 3 Bac 674. 1 Hask 106.

And the officer whose duty it is to execute the sentence of the law must do it in pursuance of that sentence and inflict the punishment in that mode in which the law points out and if he does it in any other way, he is guilty of murder.

So an officer cannot behold a criminal sentenced to be hanged.  
2 Mack 559. 1 Hask 106. 1 Hale 581. 436 179.

And for the purpose of excusing the officer the sentence must be passed by a competent jurisdiction for if his not the officer and the court would be guilty of murder and even the person

## Homicide

was guilty of a capital crime - for here two coroner's juries.

10 Co 76. 5 Co 106. 1 Hawk 105. 130. 4 BB 178.

But if the court which have competent jurisdiction pass sentence of death where the offence does not amount to a capital crime, the judges are guilty of murder only and not the sheriff, for he acts under the direction of the law and the subject matter is within the cognizance of the court. 1 Hawk 106. Co 898. 3 Bac 674. Secondly - Homicide is justifiable when committed for the advancement of public justice, so if an officer is resisted in making a lawful arrest he may use all necessary force and violence to take the person and if he cannot take him alive he must take him dead.

So if an officer attempt to disperse a riot and meets with resistance he may use all necessary force and violence and if necessary take the life of the persons resisting him, and this he may do altho he has no warrant for the purpose, in which case he acts more under the permission than by the command of the law.

1 Hawk 106. 9 Co 68. 1 Hale 494. 2 Black 550. 570.

If a felon resist or flee from his pursuers, if they act without a warrant they may take his life if necessary, this must be an actual felon, not a suspicious. 1 Hawk 106. Foster 271.

This rule proceeds upon the ground that tis the duty and right of every member of society to take a felon.

An officer having a warrant may use all necessary force and vi-

6 licence to take a felon and if upon trial he proves innocent, the officer is not liable.

But if a private man or <sup>an</sup> officer attempts to arrest an innocent man on suspicion and takes his life he is liable. He that acts on suspicion acts at his peril. so they are justified or not according to the event when they act on suspicion. Foster 318. 2 Mack 572.

When a person is acting under authority of law, civil process is as justifiable as criminal process.

In either case if the person cannot be taken alive he must be taken dead. 1 Hale 107.

There are many particular cases which fall within this rule. 1 Strange 499. 2 Mack 566. Foster 293.

Homicide is justifiable when 'tis done or committed to prevent any atrocious and forcible crime. 'Tis a general rule that where a crime in itself capital is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.

But this rule does not extend to those cases not accompanied with force. The two countries every crime are accompanied with force, yet there is a distinction between actual force and the want of it. no person is justified by taking the life of a person attempting to pick his pocket unless 'tis done with force. so also if a person attempt to break open a house in the day time 'tis not justifiable to take his life. so also if one attempts to commit a trespass, his



### Homicide

life cannot be taken even tho' he done with force. But it will justify a battery in a civil action. Porter 271. 275. Keeling 137. 1 Hawk 108. 4 B & 180. 1 Hale 435.

If a forcible attempt is made on the person of a woman and the aggressor killed, the party assailed may justify it on the ground of self defence. This is not justifiable but excusable. 2 Hawk 439. Porter 273. 1 Hawk 139.

A woman may lawfully kill a man who attempts to violate her chastity, and a husband or parent is excused in doing the same thing. So may any third person interfere, and if he commits homicide he is justified on the ground that he has a right to prevent a crime which would be capitally punished. Porter 274. Keeling 137. 1 Hawk 108. 1 Hale 438.

According to old opinions justification might be specially pleaded in law but now it must be given in evidence under the general issue, as it now seems to be settled that a man cannot be convicted only on the general issue, and as the justification is a denial of the material allegations. 1 Hawk 108. 1 Hale 475. 3 Bac 675.

Justifiable homicide is not punished at all, the very law imports that the party is not guilty.

#### Excusable homicide.

There is a very small distinction between this and justifiable homicide. The one is lawful the other venial. In one there is no degree of guilt in the latter only a small degree of it.

Excusable homicide is of two kinds. 1<sup>st</sup> Homicide by misadventure - 2<sup>nd</sup> upon a principle of self defence. The first is never involuntary, 'tis a mere accident. The second is voluntary but committed under circumstances which in contemplation of law constitute an excuse. 1 Hawk III. 4 B. & 132. Hale -

Homicide by misadventure is when one is doing a lawful act without any intent of mischief involuntarily kills another. It is necessary that the act be lawful - as where a man is at work with an axe, and the head flies off and kills a by stander. So if it is riding and B stumbles, his horse involuntarily by which means the horse runs over another man and kills him, here of the rider is guilty of homicide by misadventure. There is no principle in this case, for the rider is not the agent - he certainly is faultless. Foster 258.

Regling 40. 1 Hawk III. 4 B. & 132.

If a Parent in correcting his child in a lawful manner should kill him, he is excusable on the ground of the lawfulness of the act.

So of Master and Servant and Father and Prisoner &c.

But this rule does not extend to those cases where the beating is outrageous - nor where the punishment is inflicted with an instrument endangering the life of the person - for in such case it would be murder. So where a Blacksmith chastised his apprentice with a bar of iron by which means he died, this was holden to be murder.

### Homicide.

Poste 262. 1 Hawk 111. Keeling 64. 183.

But if death accidentally comes in consequence of an unlawful act the author is guilty of manslaughter at least, and in some cases of murder. According to Blackstone this unlawful act must be malum in se and not malum prohibitum. I believe there are no cases contrary to this rule.

If the unlawful act is a trespass the homicide is manslaughter but if it is felonious, the homicide is murder. Poste 258. 292. Keeling 117. Post 134. 1 Hawk 112.

If one intentionally kills another in the execution of a malicious and deliberate design, with intention to do him bodily harm, he is guilty of murder and not manslaughter, for the law here deems it to be intentional. 1 Hawk 112. 1 Hale 37. 475. Keeling 117.

And in general if homicide comes upon any unlawful act which commonly tends to bloodshed his act is excusable, his murder.

Eg. in case of a boxing party. And if one in doing a mere idle act without intention to kill if the tendency of the act is to occasion bloodshed, it is manslaughter if death comes. Range 481.

But if death was occasioned in consequence of lawful sport, as football it would be homicide by misadventure, here the act is lawful but in the former case it was unlawful. Poste 260. 1 Hawk 112. 4 K 6 183.

### Homicide by Self Defence.

This happens when one is a

murderer affray kills his assailant in his own defence this is excusable not justifiable. 4 B & 183. and the excuse proceeds upon a ground distinct from that in case of justifiable homicide.

This is not to prevent a Capital crime attended with force, but to preserve one's own life.

It must appear to have been the only probable means of preventing the loss of life, or of escaping from great bodily harm, in order to excuse. 4 B & 184. Ruling 128. Porter 273. <sup>Hark</sup> ~~Har~~ 108. 113.

Still the rule requires is that the assault should be a violent one and that the party assailed should be in imminent danger of losing his life or of receiving great bodily harm, hence if this danger does not exist the homicide is not excusable.

So if the parties are equally capable of offence and defence one is not excused in killing the other for he cannot inflict justice but only preserve his life or escape great bodily harm.

The distinction between one species of manslaughter and this species of Homicide is very difficult and subtle. But the true criterion seems to be this, that if both parties are actually fighting when the mortal blow is given, the slayer is guilty of manslaughter, But if the party who commits the homicide hath not begun to fight or having begun declines any further struggle, and afterwards being closely pressed by his antagonist kills him to avoid his own destruction, this is homicide excusable by self defence. Porter 277.



Persecution

Feeling 51. 1 Hale 451. 4 B & 154.

This rule may be frequently apt to mislead, but I know of no better. According to some old authorities opinion is immaterial whether the party assailing or the party assailed commits the offence. But it is now settled that the party making the first attack cannot excuse himself if he kills his antagonist during the affray. 3 Bockhypp. 259 1 Hawk 113. 1 Hale 159. Feeling 58 & 61. Foster 276. 278.

If the assault is made with intent to kill, but the assailant is beaten and flies and is pursued by the party, and then turns on him and kills him, is the party assailed - he cannot excuse himself. 1 Hawk 113. 123. Feeling 55. 123.

If two persons agree beforehand to fight and one is helped by the other and kills him, the murder on account of previous settled malice. 1 Hawk 122. 112. 1 Hale 443. 479. Feeling 149. 151.

It is not to be understood that this rule extends to those cases where the agreement to fight and the actual fighting is done at one and the same time, executed immediately - here is no act of passion. But it only extends to those cases where the agreement is made at one time, and executed afterwards. Feeling 119. 1 Hawk 125. 112.

It may here be observed that in a duel the seconds of the party killing are guilty of murder, but the seconds of the party slain is guilty of a high misdemeanour at common law. 4 B & 159. 1 Hawk 124. 1 Hale 153.

This excuse of self defence extends to the chief, and natural or civil relations. Thus a husband is excused for killing one who assaults his wife. A of master and servants. So any stranger may take the life of the assailant, if there is danger of a capital crime being committed. 1 Hale 454. 486. Keeling 137. 4 B & 136.

The killing of an officer who is attempting to arrest a man will not excuse the person killing - and this is true if the process of the arrest is illegal if too legal and good on the face of it.

For an officer is justified in obeying any precept which is valid on the face of it. 7 M & W. 2 Hawk 488. 501.

The excuse of self defence must always be given in evidence under the general issue. 1 Hale 473. 1 Hawk 105. 1 Inst 233.

Excusable homicide is said to have been anciently punished with death but this is denied by modern authorities. 2 Inst 143. 315. 1 Hawk 114. 1 Hale 425. Foster 252. 4 B & 158.

Originally it was punished with forfeiture of goods and chattels. - 4 B & 158. 1 Hawk 115.

It has always been holden that the party convicted of excusable homicide is entitled of course and of right to pardon and restitution of goods. And in Eng. the judges generally direct the jury to acquit. Foster 253. Keeling 58. 1 Hawk 115. Foster 288. It does not admit of accessories because it is not felonious. 2 Hawk 447. 1 Hale 615.

## Homicide

The third species of Homicide is called felonious.

Felonious homicide "is the killing any human creature without justification or excuse." This definition follows from the division of homicide.

Felonious homicide may be committed by destroying one's own life or the life of another.

He that puts an end to his own life is called a *Felo de se*.

A *Felo de se* is one who deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death. 1 B.C. 139. 2 Hale 152. 1 Hawk 102.

If one person request another to kill himself and he does, the latter is a suicide and the former is not a *Felo de se*. Hawk.

Every person is held to be a *Felo de se* must be of years of discretion and in his senses, else he is no crime. 1 Hale 412.

Self-murder admits of accessories before the fact, but none after. So one who persuades another to kill himself is an accessory. 4 B.C. 139.

For the purpose of example he provided by law, that a *Felo de se* have an ignominious burial and that his goods & chattels be forfeited. 1 Hale 415. 1 Hawk 103. 243. 259. 4 B.C. 190. 357.

The 2<sup>d</sup> kind of felonious homicide consists in killing some other person without justification or excuse, and is either with or without malice, and this circumstance creates the division of manslaughter and murder, and the specific difference is that the former is without

8 malice and the latter with malice. By malice is meant any unlawful or wicked motive, not ill will merely. 4 B & 190. 115. Hale 256.

Manslaughter is the unlawful killing another without malice express or implied, and may be either voluntary or involuntary. 1 Hale 456.

4 B & 191.

There can be no accessories in this crime before the fact because it is not premeditated, but there may be after the fact. 1 Hawk 115.

4 B & 191.

1<sup>st</sup> As to voluntary manslaughter.

If two persons upon a sudden quarrel, fight, and one kills the other the offence is voluntary manslaughter.

— if upon a challenge given by one party and accepted by the other, & they go immediately and fight, and one is killed it is voluntary manslaughter. But if after the challenge was given, the parties do not fight immediately so that it is not an continued act of passion, in this case if one should be afterwards killed in consequence of such challenge — offence would be murder. Porter 197. Keeling 115. Leach 155. 2 Wacks 63. 563.

If a person in attempting to part two persons who are fighting is killed by one of the parties, the offence is murder provided that the party had notice, that he interfered to quash the affray, but if he had no such notice the offence is manslaughter. Keeling 66. 1 Hawk 127. Porter 272. 310. Keeling 115.

If a person is greatly provoked by the misconduct or abuse of



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another, as by striking his nose, or spitting in his face and he had  
dearly killed the wrong dose, the killing is manslaughter. This is  
sudden revenge, and does not proceed upon notice or prethought.

But if there should sufficient time elapse for the passions to subside  
and he should then kill the wrong dose, the offence would be murder  
for there would be notice or prethought. *Holding 155. 1 Hale 496. 1 Hawk 195.  
Porter 294. 296. 316.*

The above rule is not universal for thus he executes his revenge imme-  
diately, but still with a manifest intent to kill or do great bodily  
harm, the offence is murder. So tying a bag to the tail of a horse by  
means of which the bag was killed this was murder, for then there  
was a manifest and deliberate intent to kill. *1 Hale 454. 472.  
Holding 124. 1 Hawk 126.*

If a husband kills a man in adultery with his wife and imme-  
diately kills him, his manslaughter, but if he delays it for a time  
sufficient for the passions to abate and then kills him, the offence  
is murder. *1 Hale 486. Ray 212. 4 B & 191. Holding -*

It is to be observed that bare words or insulting gestures, or breach  
of engagement, or tripping on land is never a sufficient provocation  
for a sudden killing, and in such case the offence is murder.

But if on the other hand when a provocation of this kind takes  
place and the party abused challenges the other and in such a man-  
ner as it is apparent that he meant nothing more than chal-

is violent and kills him, the offence is manslaughter. 1 Hawk 124.  
Keeling 130. Foster 316. 4 B. & C. 200. Keeling 55. 60. 64.

It is laid down generally in Keeling that if upon a sudden affray between A and B, the friend of A suddenly interposes and kills B, he is a manslaughterer. This rule I think is to be understood with some restrictions for if he should interpose in such a manner as indicates an intention to kill I presume it would be murder. Keeling 136. 61. 126. 97.

Foster 315.

Manslaughter on a sudden provocation differs from excusable homicide so depends in this, that in one case there is an apparent necessity for self preservation to kill the aggressor, and in the other no necessity at all, it being a sudden act of revenge. 4 B. & C. 192. 148.

### Involuntary Manslaughter.

This as the term is always unintentional, but ensues upon some unlawful act which it is said by many writers must be malum in se. Comp. 330. Foster 258. 261. 4 B. & C. 192.

If one occasions the death of another by an act which is malum in se prohibited the act is the same as tho it was not prohibited at all but lawful. 2 Inst. 558. Foster 259. 1 Hale 495.

If one accidentally kills another in idle and dangerous sport, it is manslaughter as such sport is unlawful. 1 Hale 492. Foster 261. 292. Holt 134. 1 Hawk 112.

But if the act is lawful in itself, if he does in an unlawful manner and death ensues he is manslaughter. So throwing down a piece of

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hinter from a building in a large city. Charge 1851. Foster 263.

Feeling 140. 4 B & 192. 1 Male 472.

But the involuntary homicide arises upon the doing of some unlawful act, tis not to be understood that homicide ensuing upon the commission of every unlawful act is manslaughter.

If it be in the prosecution of a felonious intent, or in its consequences naturally leading to bloodshed it will be murder. If no more was intended than a civil trespass it will be manslaughter.

4 B & 192. 3. 1 Hawk 126. Feeling 111. 117. 9691. Hoad 487.

Manslaughter is a felony but a cluggable one, tho the offender suffers a forfeiture of goods and chattels, and by way of commutation some corporal punishment, as turning in the wheel, whipping &c.

4 B & 193. 39. 387.

As to the manner of allowing clergy the prisoner prays it in open court. In direct voluntary manslaughter is punished with a forfeiture of goods and chattels, whipping & branding.

But the Sup<sup>r</sup> court have decided that involuntary manslaughter at common law is only a high misdemeanor, and punishable at C. law.

The next species of felonious homicide is called Murder. This word was anciently used in Eng<sup>d</sup> to denote the secret killing of another. But murder is now described by Sir C. P. Coke to be "where a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's

peace with malice aforethought either express or implied"

This definition of lates contains superfluous parts which are entirely unnecessary. I should define murder to be "the unlawful killing of any reasonable creature with malice aforethought either express or implied."

I suppose this to be a complete definition.

But in treating of this subject I shall pursue the definitions as laid down by Sir E. Coke.

1.<sup>st</sup> When a "person of sound memory & discretion" &c now there is no need of these words for they are always implied, every offender must be of sound memory and discretion. 4 B.C. 20.

2.<sup>ndly</sup> "unlawfully kills another" The unlawfulness of the act arises from the killing without warrant or excuse. The killing must be an actual killing - an assault with intent to kill is not murder but a high misdemeanor. 1 Hale 425. 4 B.C. 196.

The act of directly taking away the life of another is not only within the rule but also any act of which the probable consequence is death is within the definition. So killing a man with poison is within it. The modes are indefinitely various and the rule is made to extend to all. Hawk 118. Mudge 884. Leach 141. 4 B.C. 196.

So also the case of a son who carried out his sick father against his will in a very cold morning which caused his death - this was a killing within the definition. So where a woman left her child in



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The words to flave to death and it was killed by a pelt, she was guilty of murder. 1 Hale 431. 4 B.C. 197. 1 Hawk 113.

Another case is that where Parish officers carried a child from Parish to Parish, by means of which it died. Leach 44.

So if a Jailor knowing a prisoner to have an infectious disease puts another prisoner in the same room with him, by which means he dies, this is deemed a killing within the definition.

Stage 556. De la Hay 1575. Stage 583. 1 Hawk 117.

If a person has a ferocious beast who is accustomed to do serious mischief and he permits him to go at large and he kills a person, the owner is guilty of manslaughter but if he turns him out designedly or on purpose he is guilty of murder. 1 Hale 430. 1 Hawk 113. 4 B.C. 197.

2. If a person may be deemed to be guilty of the killing tho the immediate act is done by another as where a person incites a madman to kill another. 1 Hawk 3. 118.

It is not settled whether bearing false witness against another with an express premeditated design to take away his life, so as the innocent person be condemned and executed be murder, or not. 4 B.C. 196. Foster 132. Leach 44. 1 Hawk 119.

In Consequence provided by Stat that whoever shall bear false witness against another and on purpose to take away his life, he shall be punished with death, even tho the innocent person

is not condemned nor executed. Stat. loc. 152.

If a Physician or Surgeon administer a potion or plaster which occasions the death of the patient tis homicide by misadventure. But it has been said if a Quack had thus administered he would be guilty of manslaughter - tho this is now deemed to be false.

1 Hawk 131. 1 Hale 430. 3 Bac 664. 4 B & 197.

No person can be adjudged to have killed another unless the death happens within a year and a day after the injury is done. In computing this time the whole day on which the injury is done is the first. 1 Hawk - 3 Bac 164. 4 B & 197.

But if the party dies within the time tis no excuse for the prisoner to say that the deceased might have recovered if he had had better medical aid.

But if one gives another a wound not mortal and the person is killed by medical application, the one who gave the wound is not guilty of murder. Deeling 26. 1 Hale 425. 1 Hawk 119.

A person indicted for one species of killing cannot be convicted by evidence of a totally different species.

But where the mode of proof varies only in circumstances the evidence will support the Indictment. 2 Hale 291. 96 67. 4 B & 156.

If it is indicted as Principal in the first degree and as Principal in the 2<sup>d</sup> and on trial it should appear that B was Principal in the first and not in the second the indictment can be

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supported. 96 b p. 112. 4 B & 42. 2 Hale 292. Hood 93. 1 Mack 522.

It is laid down as a general rule in Leach that the indictment must state that the prisoner gave the deceased a mortal wound or bruise. But I suppose this can only be true when there is force used, and not in those cases where there is no force as Starving &c.

Leach 98.

The next part of the definition is "a reasonable creature in being and under the King's protection" an alien and outlaw are therefore within the rule. Indeed the killing of any person but an alien enemy in time of war is a killing within the rule.

4 B & 197. 1 Hawk 121. 1 Hale 433.

"In being" now no person can be killed unless in being, so killing an unborn child is not murder, for it is not in being for this purpose, tho' it is considered for many other purposes as a Deceased &c. But killing an unborn infant is a great misprision. 1 Hawk 121. 4 B & 198.

3 Bac 665.

But if the child in the case supposed is born alive and dies of the wound received in its mother's womb tis murder. 3 Inst 50. 1 Hawk 121. 4 B & 198. Contra Hale 433.

But the death in the case above must happen within a year and a day from the time of the injury done.

"A reasonable creature" by reasonable is here meant human for a Lunatic has no reason, yet tis not lawful to kill one.

If one counsels another to kill a child unborn and the child is



killed after it is born is pursuance of this request he is an accessory.  
 1 Hawk 121. 1 Keeling 127. 1 Hale 429, 433.

One species of murder created by Stat distinct from the other in the rule of evidence. Is provided by Stat of Jac that if the mother of an illegitimate child endeavour to conceal its death by burying it secretly she shall be guilty of murder unless she can prove by one witness that the child was born dead. But this law being pretty severe the court generally require some presumptive evidence that the child was born alive, before the other presumption is admitted to convict the prisoner. 3 Bac 665. 2 Hawk 619. Keeling 32. 4 B & C 198.

We have a Stat in Connect which provides that in such cases the woman shall set upon the Gallows with a rope around her neck for a certain length of time. See Stat of Conn. c 382.

The next clause of the definition is "with malice aforethought" This malice aforethought or as it is generally termed malice prepense is the grand criterion which distinguishes murder from all other species of Homicide. This malice or contemplation of law is any evil design, the dictate of a wicked, depraved, and malignant heart, to do spite and ill with enmity to p. C. 198. Foster 256. Keeling 126.

It is frequently laid down in the books that the court and not the jury are judges of malice, But the meaning of this is that the court are to determine from the facts found by the jury, what



## Homicide

amounts to malice, or what in law constitutes malice.

The jury are to find whether the facts exist upon which the court is to determine whether there is malice or not. 20 Reg 1493.

2 Strange 773. 1 Burr 396. 474. 2 Do 937. 2 Mack 574.

This malice is either express or implied, it's said to be express when one with a deliberate and formed design to kill or injure any individual, does kill that individual in pursuance of that design. He is guilty of murder by malice express.

It's said also to be express when one kills another by any act which indicates an enmity to all mankind. So if a person should discharge a ball among a crowd of people. 4 D & 99. Foster 261. 1 Hawk 121. Keeling 129.

Again if one kills another in a deliberate duel it's murder by express malice. 1 Hawk 122. 1 Bulst 86. Keeling 129.

In a duel it's no excuse for the party killing to say he accepted the challenge reluctantly, or that he was first attacked, for there is a deliberate and formed design either to kill or do great bodily harm. Authorities supra.

So also the second of the person who kills another in a duel is guilty of murder by malice express. 1 Hawk 124. 1 Hale 443. 451.

Giving a challenge to fight a duel is made a high misdemeanor in Eng<sup>d</sup> and in connect to a misdemeanor by Stat. 3 East 551.

If a person upon no provocation at all or upon a very slight

one attacks the other and kills him, he is guilty of murder by malice expref. Poste 255. Hawk 124.

Blackstone calls the above instance malice implied and Hawkins expref, which last is correct.

So also if one upon a sudden and great provocation kills the party provoking but in a very ferocious and cruel manner he is guilty of murder by malice expref. So tying a toy to a horse's tail. Hawk 126. Keeling 127. Hale 454. 473.

So also if upon a sudden quarrel or affray one kills his adversary but when master of his passions, he is guilty of murder by malice expref, and not of manslaughter. Keeling 56. Hawk 128.

2dly Malice is implied when the killing is in consequence of some unlawful act which was intended entirely or principally for some other purpose, kills the party slain. - as where a person discharges a ball at a fox with intent to kill and steal it, and kills it.

2 Hawk 122. 126. 4 B & 200. Keeling 111. 117.

The unlawful act in this case must be a felony in order to constitute it murder. I should define expref malice to be that which in point of fact concurs with the act of killing the party slain. And implied malice to be that which concurs with the act of killing only by imputation of law, or by a legal fiction, and not in point of fact. Hawk 126. 96 81. Hale 436. 441. 467. Poste 261.

Homicide.

If one kills an officer in a struggle to escape arrest he is guilty of murder by implied malice. Leach 115. Foster 29. 135. 308.

And in the last case tis no excuse to the slayer that the process was void, nor is the officer obliged to inform him for what cause he is about to arrest him. so this is no excuse.

A Public officer is never bound to show his warrant, but in case of a private officer or one specially authorized the rule is different, for he should show his warrant. 1 Black 129. 966. 68. Foster 137.

311. And it has been lately decided in court of King bench that when one murders an officer in endeavouring to make an arrest the prosecutor is not bound to show that he was an officer otherwise than he was acting as such. 4 P.R. 366. 2 Black 488.

All homicide is prima facie malicious, if then there is any thing in the circumstances of the case which mitigates the offence, the one accused must take the burden of proof on himself to show this mitigation. It is not incumbent on the prosecutor to prove any thing but death. 2 Black 546. Keeling 27. Foster 255.

It follows then that all homicide is malicious, and of course amounts to murder unless 1<sup>st</sup> when justified by command or permission of law or 2<sup>d</sup> when excused on account of accident or self-preservation or 3<sup>d</sup> mitigated into manslaughter by being either the involuntary consequence of some unlawful act, or if voluntary.



occasioned by some sudden and violent provocation. 4 B.C. 201.

The punishment of murder is death. This was formerly a clergy-able offence but now by 3 Eng! Stats. clergy is taken away from murderers, their abettors, procurers, and counsellors. But these Stats do not extend to accessories after the fact. 4 B.C. 201.

2 Hawk. 488. 631. 1 Hale 450.

The punishment is the same in Connecticut. Nat. Conn. 320.

Sentence of the court in case of murder and most capital felonies is that the prisoner be hanged by the neck till he is dead. If a woman is condemned while pregnant execution shall be stayed till after she is delivered tho she may be brought to plead & may receive sentence. 4 B.C. 394. 2 Hawk. 658. Finch 478.

The execution of a condemned Person is never complete till he is dead. 4 B.C. 406. 2 Hale 412.

There is a species of murder more highly atrocious than ordinary murder which is called Polit treason, because it involves a violation of private allegiance. Polit treason is nothing more than murder in its most odious form. 4 B.C. 202. Foster 107. 324. 336.

At our law many offences were called Polit treason which are not so now. Now nothing is Polit treason but murder, for by Stat of Edw.<sup>3</sup> no offence can be Polit treason only in three cases, by a servant killing his master, a wife her husband, or an Ecclesiastic his superior. 5 Bac 141. 4 B.C. 208.



Homicide

1 Hawk 131.

This killing must be such as would make it murder in any other person. 1 Hawk 132. 2 Inst 574.

Pitt treason always includes murder but murder does not always include petit treason. 1 Hale 386. 1 Hawk 133. 4 B.C. 203.

If a wife procures a stranger to murder her husband, she is guilty of murder as accessory. 5 Bac 42. 1 Hawk 132.

The murder of one's mistress or master's wife is Pitt treason. 1 Hawk 132. Hale 386.

So also the murder of a master by one who was formerly a servant is Pitt treason, if this danger was formed while a servant of the master. 1 Egg. 4. Bac 203. How 260.

But the murder of a Father by a child is not petit treason unless the child is by reasonable construction of law the servant of his Father.

If the child is emancipated or is 21 years of age the murder will not be petit treason unless he makes a new contract with his father to serve him. Hale 380. 1 Hawk 131.

Pitt treason was formerly a capital offence but has been taken away, and also from accessory after the fact. 1 Hawk 133. 4 B.C. 204.

The punishment is capital as in case of murder. 1 Hawk 133. 4 B.C. 204.

In an indictment for Pitt treason he may be acquitted and then convicted for murder. death 299.

Arson is the malicious and wilful burning of the house or out house of another man. 4 B & C 220. 1 Hale 556.

Not only the dwelling-house merely but all outhouses which are parcel of it, and are within the curtilage are subjects of arson. 4 Co 20.

1 Black 165 4 B & C 221.

And it seems that at common law a barn filled with corn is a subject of arson, tho' this would not be within the definition, but a stack of corn is not a subject of arson. 1 Black 165 4 B & C 221.

The burning the frame of a house is not arson because tis not within the meaning of the word house. 1 Burr 289. 1 Black 166.

A prison house is a subject of arson this is a dwelling house, it must be described to belong to the corporation to which it does belong.

Black 67.

It is said in most all the books on this subject that arson may be committed by burning ones own house if anothers house is burnt in consequence of it. But tis clear that the burning of ones own house is not arson, the offence in this case consists in the burning of anothers, no matter what means are used. Cro Car 377 4 B & C 221.

Black 217 219.

That the burning of ones own house cant be arson not only appears upon principle, but from authority which is settled, for tis clear if one seized in fee or possessed for years of a house burns it, & does

Arson.

not burn nor endanger any other house, not his, he is not guilty of arson. Foster 116. Hawk 166. Co 6977.

And I also take it to be clearly settled that if one joined of a house in fee or purchased, he gives in a city burns it with intent to burn another house, but in fact burns his own only, he is not guilty of arson. Co 6338. 1 Hale 568. Keeling 29. Foster 115. Leach 217, 219.

But the burden cases go still further for if one is in possession of a house under a lease agreement, for a lease for years the he has no lease and he wilfully and maliciously burns it, he is not guilty of arson. Is also of a tenant from year to year. Leach 219, 235.

But the firing one own house in a town or city is a high misdemeanor. 1 Hale 568. 1 Hawk 166. Keeling 29.

On the other hand if a landlord burns a house in which he owns the reversion, but in which another dwells, he is guilty of arson, for the house is not owned by him but by particular tenant Foster 115. 1, BB 221.

In respect this offence is regulated by Stat. but is much the same as at com law except that by Stat the wilful and malicious burning of any house, out house or barn is Arson. Stat Com 182.

Our Stat punishes arson in the same way that it does the burning of any ship or vessel - tho the burning of a ship is not Arson.

But I will pursue the definition as to the "burning" is now settled that neither a bare intent to burn, nor an actual attempt to burn unless the house is burned is arson. But the actual burning of any part however small is arson, if it is a willful and malicious burning.

1 Hawk 164. 1 Hale 570. 2 Leach 605.

So the burning of a single shingle on the roof is arson.

But this burning must be a willful and malicious one. If then one burns the house of another through negligence or accident, he is not guilty of arson, but is liable civiliter only. Mowd 495. 1 Hawk 164. 1 Hale 569.

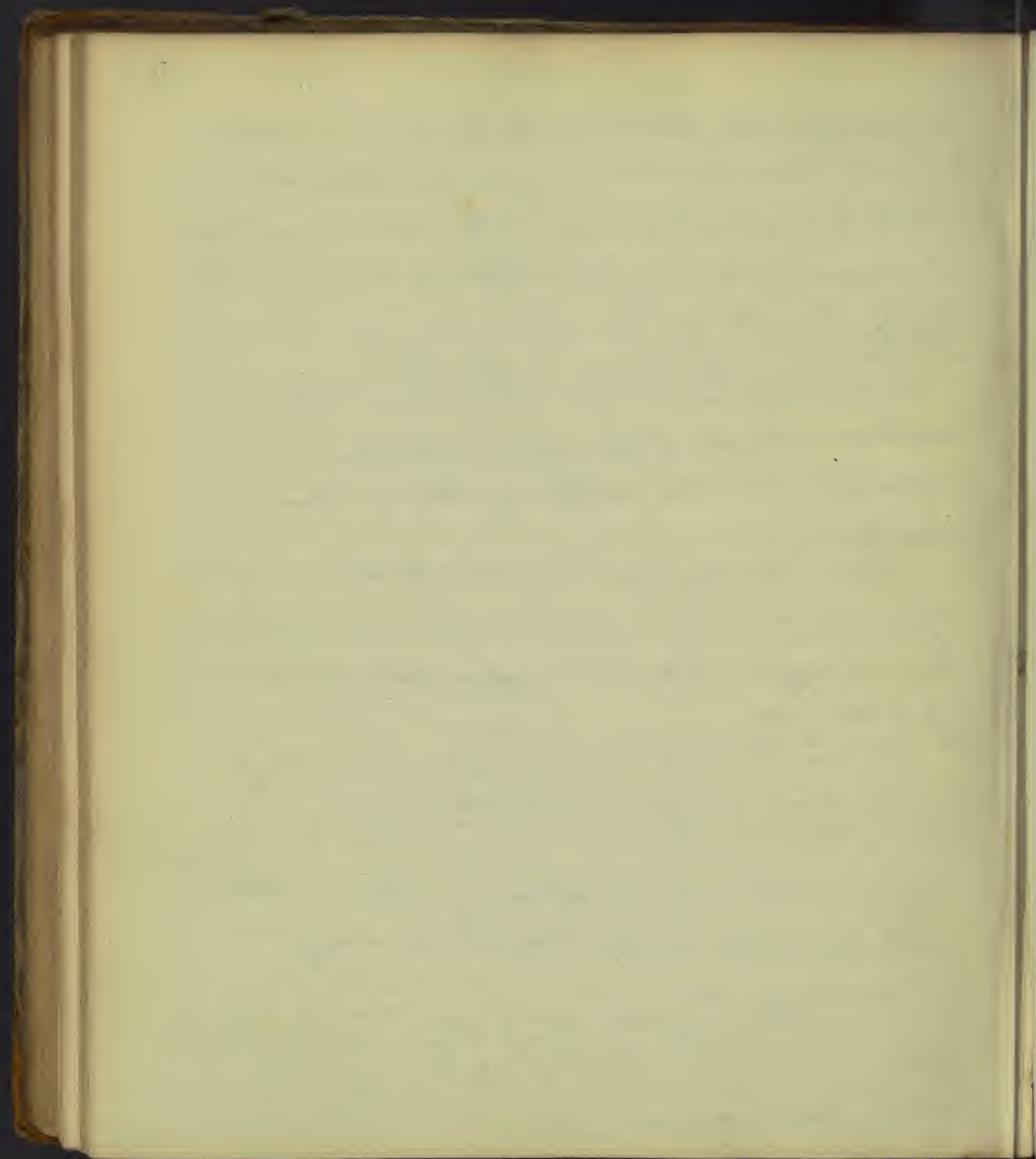
Arson is a common law felony punishable with death, it is not a clergyable offence and was not at common law. 4 R & 221. 2 Hawk 491. 503 Benefit of clergy is also denied to accessories before the fact, but not to those after.

Under our Statute of Connect if a person of 16 years of age or over commits arson, he is punished with death if prejudice or hazard happen to the life of any person. This is too vague a definition and I should doubt whether our Courts would give any construction at all to it unless the party received some great corporal harm or injury.

Stat Conn 182.

I suppose if a person under the age of 16 commits arson & prejudice or hazard happen to the life of any person, he would be punished for a high misdemeanor.





Assault.

See Stat also provides that if any male person of 16 years of age or over commits assault and no prejudice or hazard happen to the life of any person - the offender shall be imprisoned in the gaol for a term not exceeding 7 years, But if a female she is to be imprisoned in a work-house or jail. Stat Conn. 1855-56.

The Stat says nothing as to the age of females in these cases, but I suppose it must be the same as that of males.

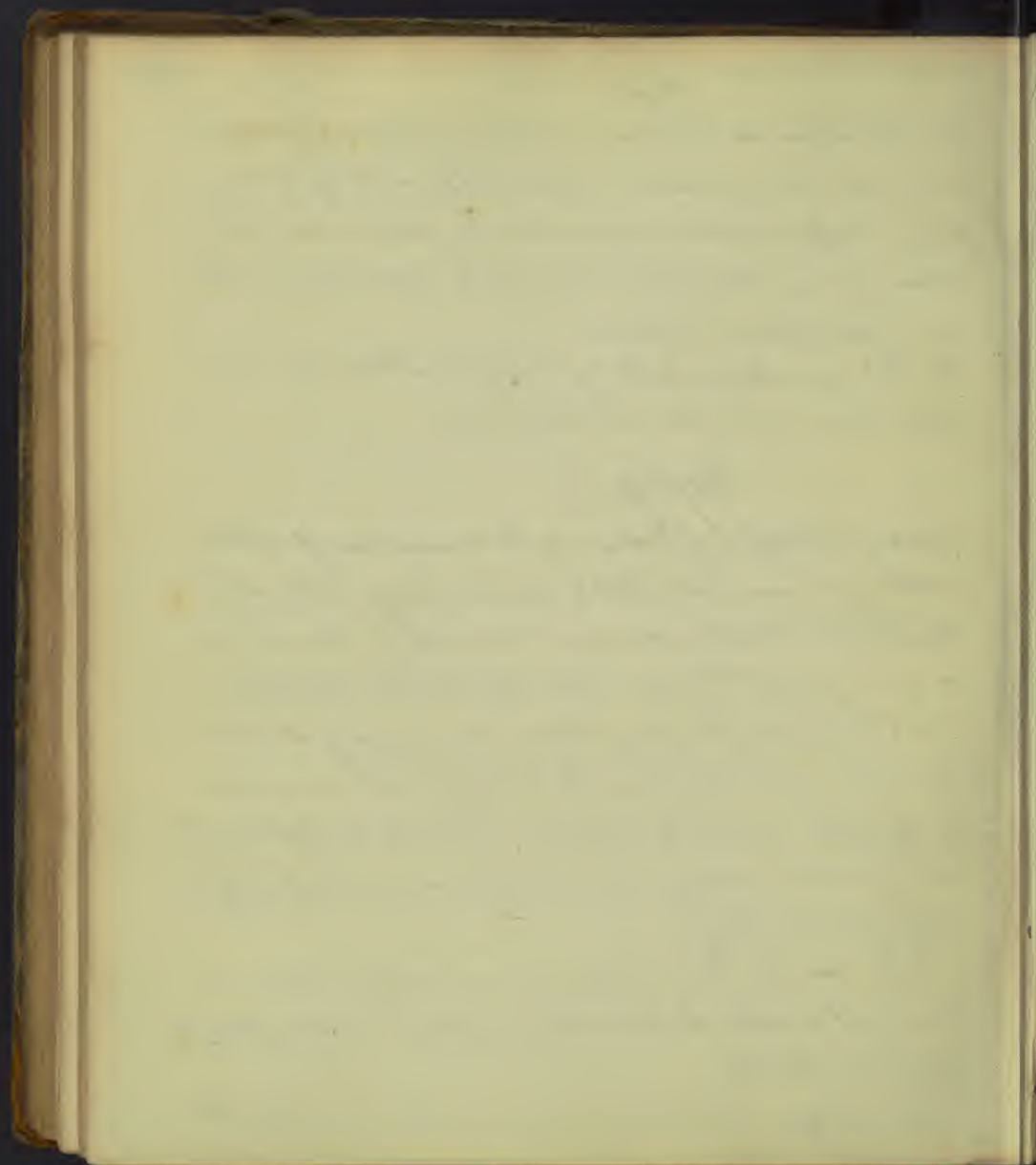
Burglary.

Burglary is the offence of breaking into the mansion house of another in the night season with intent to commit a felony. In this definition should be included a church and the walls of a town which are now subjects of Burglary. 4 B. & C. 221. 2 Black 60. 1 Hawk 159.

As to the subject of Burglary therefore, to act accordingly that it be a mansion house for a church and the walls of a town are now within the definition. Where the building is a private one possessing the word mansion is necessary, But where "church or wall of a city" is spoken to act accordingly.

The term mansion house includes all out buildings which are parcel of it or within the homestead or curtilage. 4 B. & C. 225. Keeling 27. de. 52. 82. Leach 320.

The curtilage is that portion of ground which is enclosed within



the mansion house by one window, or is connected with it by a fence. Leach 145. Hawk 163.

A single room may be considered as a mansion house if the owner does not lodge in it and enters at a different outside door from the person who searches the room.

But if the owner does lodge in it and enters at the same door, 'tis but one mansion! Hawk 163. note 164. Keeling 83. Cowp. 1. Leach 90.

230.278. It seems that a mansion house is one in which some person usually lodges, and the lodging makes it this dwelling and lodging is necessary to make it a mansion house for the purpose of Burglary. Leach 90. Hence an uninhabited house cannot be a subject of burglary. If the owner leases a house to A within the curtilage and B does not lodge in it, it is not a subject of Burglary at all, for the owner has no right to it and the owner does not lodge in it. But if B does lodge in it 'tis a subject of Burglary. Hawk 164. Hobbs 558. 4. 36 225.

It is not necessary however to make a house a subject of Burglary that some be actually in the house at the time the offence is committed. So if it be a house in which a family ordinarily resides, tho' they have left it for a time still it is a mansion-house and a subject of Burglary.



## Burglary.

1, to 40. Porter 77. Hale 556. Fisking 46.

The house of a corporation is within the definition provided any other officer live in it, or any other person does teach by. Porter 35.

It was settled that a house which one has hired, and has removed out of his goods, but not his family, is a subject of Burglary.

Reeling 45. San Day 2276. Porter 77. Hale 167.

But a tent or booth is not a subject of Burglary even tho a family reside in it for tis not a house. Barth 164. 4 B & 226.

Our Stat in Council has extended the subjects of Burglary.

Under our Stat Burglary may be committed in any shop where goods, wares, and merchandise are deposited tho no person lodges in it, or even did. Now upon the construction of this expression our courts have gone to great extants. It has been here decided that breaking open a school house also the fore-castle of a boat and a Coopers shop was burglary. Now I conceive there are not subjects of Burglary, going upon this construction you may make the breaking of a house which has nothing but a warehouse in it burglary. Now by Goods, wares &c is meant as I conceive such as are intended for sale or traffic, they ought to be used in the place in which merchants use those terms. Stat Law 154. Stat 63.

The common definition requires that the house be a Dwelling house, therefore you must shew the use of the house

in the indictment. Leach 213.

This is of the subject of burglary.

In the night season. It was formerly held that from the time the sun went down till it arose again was night season. But it now includes the time between the evening and morning twilight. and if there is so much day light that one can clearly distinguish the countenance he is not night season. 7 Lab 1. Hawk 160. 1 Hale 350.

2 Mack 600. 4 B.L. 226.

Definition requires the "entering" the house as well as the breaking, therefore entry without breaking, and breaking without entry is not within the definition, but it is not necessary that the breaking and entry be at one and the same time. Reeling 67. Leach 342. 4 B.L. 226.

Now the breaking may not only be by thrusting open the door, but also by lifting a latch, picking a lock, or removing any fastening whatever is a breaking within the definition. Art 167. Reeling 67.

1 Black 160.

And is settled that an entry through a chimney is a breaking within the definition, for this is as much closed as the nature of the thing will admit of. authorities supra.

But the breaking of chests, cupboards &c within the house is not burglary. Doster 108. Reeling 31.

But the breaking of an inner door is burglary. 1 Hawk 160. Reeling 67.

Burglary.

2 Mack 601.

If one opens a house with intent to rob it, and the owner opens the door to drive him away and he enters, the breaking is Burglary because the opening was occasioned by his felonious intent. 1 Hawk 161. 4 B & C 226. Fostling 43. 2 Mack 602. 1 Bac 333.

Whether the breaking out of a house is within the definition is not settled by Com law. But in Eng<sup>d</sup> by Stat of 1791 this is declared to be within the definition. We have no such Stat in Canada.

1 Hawk 161. 1 Hale 554. 4 B & C 227.

An entry procured by fraud is burglary as much as one effected by force. If one is let into a house under pretence of business and robs it, tis Burglary. 1 Hawk 161. Fostling 42. 1 Bac 333.

As an inner door can't be opened tis settled that if a servant enters the room of his master, or any other person enters the room of a lodger in the same house with intent to steal tis burglary. Fostling 67. 2 Mack 601.

If a Servant conspires with a stranger to enter a house and he lets him in, they are both guilty of Burglary. 2 Mack 601. 4 B & C 227. Charge 381.

The least entry with the whole or part of the body, or with a hook to take out articles, or with a weapon of

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defence is Burglary. Postn 109. 1 Hawk 161. Keeling 57.  
and in pursuance of this rule if one puts a key into a door and un-  
locks it and then runs away to Burglary for this is both a breaking  
and entry. But I presume this is not law. See a similar case of being  
into a door in Leach 342. 1 Hawk 162 note.

If on an indictment for breaking entering and stealing, he is  
acquitted for the breaking and entering, he may be convicted on the  
same indictment for the stealing. Leach 59.

"With intent to commit a felony." Therefore there must be a felonious  
intent and if none it is a trespass only.

As there must be a felonious intent to constitute this crime, it has been  
determined that where a servant who had ran away from his master  
returned in the night and broke open his master's house in order to  
get his own money which he had left, that he was not guilty of  
Burglary. So a person may enter to beat a man or to take his own  
property. 1 Hale 556. Keeling 30. 6y. 1 Hawk 164.

It does not make any difference whether it is a flat or locusts felony.  
Keeling 481. 4 SB 223. 1 Roe 336.

It is not necessary that this felonious intent be executed, as a breaking  
and entry with a felonious intent is sufficient. Postn 109. 1 Hawk 159.  
1 Hale 549.



## Burglary.

After one has been acquitted on an indictment for breaking the house, and stealing the money of A, and indicted for the same breaking, and stealing the money of B, the indictment can't be maintained for stealing the money, is not burglary. He is sure he may be prosecuted for stealing the money of B. Feeling 30. 52. 2 Hawk 527.

Burglary is a felony at common law, but it was a degradable one. But felony is now taken away and also from accessories, before the fact. 1 B6 228. 1 Hawk 165.

The lowest punishment for the 1<sup>st</sup> offense is by confinement in Newgate not exceeding 3 years, for the 2<sup>d</sup> offense - not exceeding 6 years, and for the third during life. Stat. law 184.

The above is the punishment in common cases, But if the person in committing a burglary is guilty of any personal force, abuse or violence, or is armed with a dangerous weapon, he shall for the first offence be sent to Newgate for life. This is too vague as a rule of punishment.

It has been decided that an indictment for Burglary need not be counted on the Stat. Stat 54.

The same distinction between males and females is observed here as in case of arson.

## Larceny.

This is the most important title in criminal law to a person who

intends to become a practitioner.

Larceny is that which in common parlance we call theft. It is of two kinds. It is of two kinds, simple & mixed. Simple larceny is plain theft unaccompanied with any legal aggravation. Mixed larceny includes in it the stealing from one house or person - 4 Inst. 229. 1 Hawk 134.

1<sup>st</sup> of simple larceny: This is the felonious taking and carrying away the personal goods of another. 4 Inst. 229.

Simple larceny is also divided into two species grand and petit larceny. By rule of common law if the goods stolen are over the value of 12 pence the stealing is grand larceny, if of that value or under it is petit. 1 Hale 544. Inst. 133. 1 Hawk 145.

The only difference therefore between grand and petit larceny consists in the value of the goods stolen. Hence all rules that descend as to their general nature will apply to both. They however differ in their punishment.

If goods are stolen by several persons over the value of 12 pence they are all guilty of grand larceny i.e. there can be no division made of it to reduce it to petit larceny.

So on the other hand if one person steals under that value at any number of times in the same day and from the same person it may never be made grand larceny but is petit only. Leach 255. —

Larceny.

1 Hawk 145. 1 Hale 531. 2 R. & W. 719.

To pursue the definition 1<sup>st</sup> there must be a taking, and this taking must be from the possession of another either actual or constructive, and is laid down as a general rule that every larceny includes a trespass, therefore if he does not commit a trespass in the taking he cannot be guilty of larceny. 1 Hawk 134. Buting 24. 51. 4 B. & C. 230.

I will here remark that this rule is not law, as I intend to show presently by adducing late decisions which are directly opposed to it.

"constructive possession is a right of present possession. If any goods are in the hands of a depository I have a constructive possession. 1 B. & C. 438. 4 & 489. 7 Reg.

If one finds goods and converts them to his own use or embroyles them he is not guilty of larceny, tho he has animus furandi, for there is no taking i.e. no trespass. 4 B. & C. 230. 1 Hawk 134.

This Example is not law according to later decisions. see as to example 1 Hale 204. 2 Bac 472.

But it has always been that if one obtains goods of another with intent to steal and does embroyle them he is guilty of larceny. So obtaining a bill of exchange under pretence of getting it discounted and then keeping it.

The proceeding in this case is a *violen* seizure upon the law

which will not be suffered. 1 Hawk 135. Keeling 51. Leach 203. 266.

95. 231. 291. 355.

The possession in this case is considered as still residing in the owner but this for the purpose of larceny only. But if one applies to another to purchase goods with an intent of never paying for them, and the owner sells them to him, and he runs away with them, he is not guilty of larceny. Leach 95. 358. 401.

Now the difference between larceny obtained with intent to steal and the purchasing goods with an intent to convert them, is that in the latter case the owner parted with both the legal and actual possession, whereas in the former case he did not.

If one obtains goods under a replevin with an intent to steal them he is guilty of larceny. So if goods are taken by an execution which was issued on a judgment obtained by a fraud practiced on the court he is guilty of larceny - here the Replevin & judgment are both void. Ray 276. Keeling 43. 1 Hawk 136.

The cases I have mentioned are made larceny under the general above rule. But modern cases seem to abrogate that rule, as to the trespass in taking.

I take the general rule to be this - that when the delivery of goods is for a certain special purpose, and one countermands - He by the owner that he has a constructive possession, and



## Larceny

therefore that the embezzling the goods is larceny.

There are many cases in support of this rule. It was decided at Old Bailey in 1779. that a watchmaker to whom a watch was delivered to clean and repair, and he never returned it was guilty of larceny. Again, where a man delivered cloaths to a washwoman and she ran away with them, she was guilty of larceny. And in another case if I deliver a quantity of guineas to B to exchange them for other money, and B ran away with them, he was adjudged to be guilty of Larceny. 1 Hawk 135. note.

Still another case where goods were delivered for safe custody, & the person to whom they were delivered embezzled them.  
Leach 242. 142. 349. 2 Black 588.

It will clearly be seen from the rule I have laid down & the authorities in support of it, that all those examples which do not amount to larceny by the old rule, are made so by this except the case of finding goods, and I conceive this case of finding and embezzling is larceny under the rule I have laid down.

The case of the carrier under the old rule is not guilty of larceny. But this is exactly the same case as that of the watchmaker and the wash-woman.

But it was always considered under the old rule that if a carrier opens a bail of goods and takes some of them out, or

draws liquor from a cask that he is guilty of larceny. 4 R 6. 230.

1 Mack 135. Treeling 53.

But to perfectly clear upon either principle that if the carrier having conveyed the goods to the place of destination and then takes them *animo furandi* he is guilty of larceny.

So also if the Bailee should take the goods to a different place from that to which he was ordered to carry them, and should embezzle them, he would be guilty of larceny, for here the Bailee is a stranger to the bailment, he is not bailee to go to Hartford when sent to New Haven. Treeling 83. 1 Hale 504. 4 R 6. 230.

14 Ark 136. Leach 358.

If one lets a horse or any other personal property to another and the latter on a delivery runs away with them and embezzles them he is not guilty of larceny, and the reason is that there is <sup>general</sup> no property remaining in the vendor, for according to the terms of the contract he parted with all possession both actual and constructive. Leach 401. 2 Mack 592.

So also if one lets a horse to another and he immediately rides away with him and converts him to his own use, he is not guilty of larceny. If however there was an original intent to steal in this case, he would be guilty of larceny. Now there is in this case no right of countermanding in the owner till the time has

hired for which he let his horse, therefore there is no constructive larceny in the Bailor during the time.

Leach 213. 358. 401. 7 J.R.g. 2 Annot 592. 4 B&C 230.

As to these cases of bailment are seen to arise the following rules from what has been already said.

1<sup>st</sup> When according to the terms of the bailment the Bailor has no power to countermand at the time of the conversion the embezzling or conversion is not a taking within the definition unless there was originally an intent to steal. As in the case of hiring a horse and converting him to his own use during the time for which he hired him - here is no larceny.

2<sup>d</sup> Rule is that if the Bailor had according to the terms of the Bailment a right to countermand the delivery at the time of the conversion, the taking is Larceny. Now in the latter case there is a constructive possession in the Bailor at the time of conversion.

3<sup>d</sup> Rule is that if the Bailment was obtained with intent to steal a subsequent taking by the Bailor is a taking within the definition and this is true whether there was a right to countermand in the owner or not. The original felonious intent is sufficient.

The bare non-delivery of goods by Bailor to Bailor is not of course Larceny. It is not of itself a taking, but it may be evidence of a felonious intent. 4 B.&C. 230.

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There is a distinction taken at Com law between Servant & common carriers. By com law if a servant runs away with goods entrusted to him once he is not guilty of Larceny, for he is considered as a mere civil injury or breach of trust. But by Stat the servant is made guilty of larceny in such cases if the goods amount to 40 shillings, and the servant be of the age of 15 years. 1 Hale 504. 4 B & 280. 1 Hawk 89. 138.

But since these modern decisions which I have mentioned I presume the court would decide it to be Larceny at Com law for this is precisely the case of the washerwoman.

But at Com law if a servant has not got the possession but only the care and oversight of his masters goods and he embezzles them it is a taking within the definition and if with a felonious intent 'tis Larceny. Poph 84. 1 Hale 505. 1 Hawk 136.

If goods are stolen by one man and are afterwards stolen from him, the latter is guilty of a taking, and a taking, from the true owner, for the first thief had not right to them. 1 Hawk 136.

2 Mack 589. If one steals goods in the county of A and carries them into the county of B, he is guilty of a felonious taking in both and may be prosecuted in either. 1 Hawk 136. 2 Bac 473. 1 Root 69.

But this rule cannot obtain where the goods are taken in a



## Larceny

Foreign State and carried into another, as United States. For one State is not supposed to know what the criminal law of another State is, and also that which might amount to a felony in one State might only be a trespass in another.

In Connecticut however the Courts must have decided to the contrary, and have tried and sent persons to other States, who stole in another State. But I conceive if a case were to go to the Court of Errors, they would decide as I have laid down the rule.

Judge Patterson so decided in this District, about 4 years ago.  
See U. States vs Page.

If the wife of the owner of goods deliver them secretly to a Person he is not guilty of Larceny, a civil action will only lie against him and the wife cannot possibly be guilty.

But this is the only domestic relation which will excuse the receiver. Leach 49. Thus far of the taking.

There must also be a "carrying away" and as to this it is settled that the least removal from the place in which they are found is a carrying away.

So putting an earring out of a ladies ear, and it felt and caught in her hair was decided to be a taking away.

Barth 140. 2 Vent 25. Foster 109. Keeling 31. Leach 229. 297.

But it has been decided that raising a bait of goods so that

it rolled over, was not a taking away because they were not moved from their place. Leach 229.

The taking must be a felonious one or *animus furandi*, a felonious intent is essential to larceny, it is manifest therefore that a person destitute of understanding cannot commit larceny.

It may be not felonious to a bare trespass and may be accompanied with a breach of the peace.

Now whether the intent is felonious or not must always be determined from the circumstances of the case. So if a servant should take his masters horse without his licence & should return it again, he would not be guilty of larceny. 1 Hale 509. 4 Bb 232.

The taking and carrying away privately is usually evidence of a felonious intent. But this will not always be conclusive, it is a sufficient presumption which must be rebutted.

And here it may be remarked that if a person takes the personal goods of another without his consent the law will presume a felonious intent, and this presumption must be rebutted & prima facie evidence is conclusive unless it is rebutted.

Leach 203.

The next clause of the definition relates to the subject of larceny which is the "personal goods" of another.

Larceny.

Things, real or those which favour of the really are not subjects of larceny. Hence the produce of land while growing is not within the definition, they adhere to the freehold, and are not personal property till they are severed and suffered to remain in possession of the owner.

So if they are severed and carried away by one continued act the produce has now become the personal goods of another.

1 Hawk 141. 1 Hale 509. 512. 11 Cent 189. Leach 208. 4 R & B 332.

But if things of this kind as apples, grapes, gearings are severed at one time and are afterwards carried away they are then subjects of larceny and it makes no difference whether the owner or the thief severed them. 1 Hawk 141. 1 Hale 510. 3 Inst 109. 4 R & B 233.

It is now settled that the wool till lately that wool from off a sheep and taking milk from a cow is larceny i.e. wool and milk are subjects of larceny when taken from the animal. Leach 131.

2 Black 573.

The reason given why things favouring of realty are not subjects of larceny is that they are not so easily removed as personal, therefore less danger of being stolen. 2 Inst 169. 1 Hawk 142. 4 R & B 232.

By our laws charters of lands are not subjects of larceny because

to said they relate to real property. But this is surely a singular reason, for charter of land are strictly personal property and indeed never will lie to recover them. 1 Hale 66. 510. Strange 1137.

Leach 13.

But I conceive the reason why deeds of land are not subjects of larceny to be the same as why choses in action are not.

The goods taken must have some intrinsic value in themselves and for this reason choses in action are not subjects of larceny, for they have no intrinsic value in law. 3 Co 33. 1 Hawk 142. 2 Bac 470. Contra 1 Hale 66.

These things however are made subjects of larceny by Stat of 11 Geo 2<sup>d</sup> and in cannot we have a similar Stat passed a few years since. 2 Bac 470. Stat Town 648. new Edit<sup>n</sup>

Again nothing can be a subject of larceny unless some person has a property in the thing stolen. There can be no larceny unless there is a civil wrong. Besides, the law requires that it be the property of another - Hence animals ferae naturae are not subjects of larceny - No person can be said to have a property in them.

Foster 366. 1 Hale 511. 1 Hawk 143.

But animals which are originally wild may become the subjects of larceny, if they are taken and confined and are of intrinsic



### Larceny.

value. But generally wild animals are never considered valuable unless they will serve for food. Hence if they are not used for food in general they are not subjects of larceny.

2 B.C. 393. 4 to 235.

But on the other hand the wild animals are reclaimed, if they are not used as food, as monkeys, foxes &c they are not subjects of larceny. 1 Hawk 143. 3 Inst 109. 2 B.C. 393.

But a civil action of trover will lie for the taking a conversion of these animals. 2 B.C. 393. 4 to 235.

A tame hawk is an exception to the rule as to those animals used for food for they are considered valuable at com law. 2 Bac 470. 1 Hawk 143. 3 Inst 109.

But this rule as to valuable animals is confined to wild ones, for domestic animals tho they do not serve as food are subjects of larceny as horses and mules. So those domestic animals which do serve as food a portion are subjects of larceny. 1 Hawk 144.

1 Hale 511. 4 B.C. 236.

There are some domestic animals which are not considered as valuable and are not subjects of larceny as dogs & cats tho an action of trover will lie for taking them.

As all personal <sup>goods</sup> property are subjects of Larceny at com law to clear

that money is a subject of larceny.

But upon the construction of an English Statute which takes away the benefit of clergy from those who steal goods, wares, and merchandise, it has been determined that money is not included in that Statute and therefore that where it is the subject of larceny it is a felony within the benefit of clergy. *12 Mod. 234. 463.*

"of another" goods of which no one is the owner at the time of taking cannot be the subject of larceny for here the property is in subitus. So treasure trove wares and strays as to their property are deemed to be in a state of nature, before they are found for the king. *1 Hale 512.*

*1 B. & 295. 1 Hawk.*

But tho' the goods must belong to some one, yet it is said that the owner need not be known and an indictment may be brought against him for stealing the goods of a person unknown. *299 ff. 1 Hawk. 144.*

But it is said by D. Hale that unless it is proved at the trial that the property is in some person, it shall be presumed to be in the prisoner. This is a very good rule. *2 Hale 290. 5 Mod. 249. 2 Mack 580. 4 B. & 382. 1 Hawk. 145. note.*

The goods in a church are subjects of larceny for they belong to the parish or corporation.

A shroud on a dead body is also a subject of larceny. *12 Co. 113.*

*1 Hawkins Pleas of the crown 145.*

Larceny.

The stealing a dead body is not larceny but to a high misdemeanor at com. law. 29 R. 733.

But to said a man may commit larceny by taking his own goods in certain cases. i.e. if a man takes his own goods from a Bailor or from his servant with intent to subject them he is guilty of larceny. From these examples appear to me to be destitute of any principle, for I conceive the man in such case to be guilty of a great fraud only. See E. 536. 3 Inst. 110. 1 Hawk 145.

If the goods of one man are bailed to another and a stranger steals them from the Bailor he is guilty of larceny and may be indicted, as taking them from Bailor who has a special property against every other person but the true owner. Keeling 39. 1 Hawk 145.

There has been some question in the books whether one indicted for larceny and having a special verdict found against him as guilty of trespass can have judgment rendered against him for the trespass. But it is now settled that this cannot be done, and the reason is they are not two species of one genus, but are of different genera. Keeling 29.

As to the punishment of simple larceny.

All simple larceny at com. law is felony. Grand larceny at com. law is a capital felony. But Petit felony larceny is not. At com. law grand larceny is within the benefit of clergy, but taken away

in many instances by Statute. 4 B.C. 95. 297. 2 Hawk 489.

As to the punishment of Petit larceny two eminent writers differ. Hawkins says there is a forfeiture of all goods and chattels besides whipping &c but Blackstone says there is no forfeiture. I am of opinion that Hawkins is correct and that Blackstone is wrong.

1 Hawk 446. 4 B.C. 237. 95. 97. in which last authority Blackstone seems to allow the doctrine.

The larceny is punished by Stat and no distinction is made between grand and petit larceny. Here no larceny is a capital crime. The Stat prescribes different degrees of punishment according to the amount of the property stolen. All larceny is here punished with a fine not exceeding 7 dollars and if the goods amount to 20 shillings to fine and whipping. If of the value of 5 shillings and under 20 to a fine or whipping in the alternative - If under 5 shillings a fine only. One Stat enables the party injured to bring a quarettum persecution. Stat Connect 413.

When the goods stolen do not exceed the value of ten dollars the offence is cognizable by a single magistrate if over that by the County Court. There may frequently be a doubt whether the goods exceed the value of ten dollars, and generally when there is any doubt as to their value a single magistrate may take cognizance of it -



Larceny.

There is a right of appeal from the single magistrate.

Mixed Larceny.

This has all the properties of simple larceny but is also accompanied with the aggravation of taking from ones house or person or both.

1 Hawk 151. 4 R & 239.

As to Larceny from the house all that can be said of it is that its more aggravable, its not distinguished in its nature from simple larceny. 4 R & 239. 1 Hawk 151.

It is said when this offence is accompanied with breaking the house its then Burglary. But I conceive this to be incorrect for they are separate offences tho they are included in the same indictment.

Larceny from the house is excluded from benefit of clergy by several Statutes, tho its a clergyable offence at Com. Law, and this is the only difference between simple and mixed larceny as to their punishment. For simple larceny is in almost every case within the benefit of clergy. 1 Hawk 151. Felony 31. Foster 78. Leach 310.

In Connect Larceny from the house is not distinguished from simple Larceny.

The second kind of mixed larceny is from the "person" and this may be committed either by stealing privately from ones person or by open and violent assault. The latter is called Robbery and the former is generally called "pocket-picking".

The offence of privately stealing from one person is a felony at common law, and there are two grades in it as in simple larceny, as to the value of the property stolen. So if over the value of 12 pence it is capital and if under that value not capital.

Stealing from the person privately is a felony and benefit of clergy is taken away from it by Stat of Edw. 3 if over the value of 12 pence. 4 B. & C. 241. 1 Hale 529. 2 Black 579. Leach 233. Poston 73.

Open and violent theft from the person is called robbery, and this is of essentially distinct from simple larceny.

Robbery is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear.

The value is immaterial for the offence and the punishment are the same however great or small the value may be. 4 B. & C. 242.

To constitute this offence there must be a taking from the person of another. And in the first place there must be an actual taking, an attempt to rob merely is not robbery at common law, tho' it is a high misdemeanor. 1 Black 44. 1 Hale 532.

But by Stat 2 Geo 7 an attempt to rob is made a felony not capital but punishes the person attempting by transportation for 7 years. Leach 22. 251. 1 Black 45.

The taking must be from the person of another, but by this is not meant from the manual possession of the man, for if one

### Robbery.

takes goods in the presence of the owner if with violence or by exciting fear, the taking is a taking from the person within the definition. 1 Hale 533. 2 Strange 1015. Bault 445. 1 Hawk 138.

So also if one through the instrumentality of fear takes goods from my servant in my presence it is a taking from the person within the definition, for the possession of the servant is the possession of the master. 1 Munk 148.

It is said there must be a forcible taking & yet it is not necessary that actual violence should be used in the taking all that is meant is that the goods be obtained under the influence of terror by extortion, compulsion &c and upon this principle it has been determined that if one by sweaves and threats extorts an oath from another that he will go and bring him goods and he does go and get them and deliver them that this is a forcible taking within the definition. 3 Inst 68. 1 Hawk 147.

But a taking which is not directly from the person of the owner nor in his presence, is not within the definition. So if a person is apprehended ~~in~~ <sup>in</sup> the act of being robbed throws down his goods and runs and they are taken, this taking is not within the definition. Com A 478. 2 Strange 1015.

It is said down as a rule in most of the books that if several persons join to rob it and instead of robbing it, one of them

separate from the other, and robs B unbeknown to the rest, all are guilty of robbing B, because of the intent to rob. I hardly think this case can be law - it appears to me that the rest cannot be guilty of robbing B for they have left the pursuit of A, and do not know of the robbing of B - for the rule see 1 Hale 533. 537. 2 Hawk 596.

The offense of robbing is consummated by the act of taking, from that moment he is a robber and if he should immediately deliver the goods still he would be guilty. 3 Inst. 60. 69. 1 Hawk 147. Leach 224. 2 Callack 594.

This taking must be by violence or putting in fear it would seem that both violence and putting in fear were necessary but either of them alone is sufficient. By violence is meant actual violence, actual force committed on the person. This violence or putting in fear is the grand criterion which distinguishes Robbery from every other species of Larceny. 1 Hawk 148. 2 id 494. Keeling 69.

The word violence then implies something more than the mere act of taking. The violence must also be such as is calculated to excite fear, and if it not do not robbery. Hawk 149 note Foster 128. Leach 213.

But the violence or putting in fear must be previous or simultaneous with the taking, for if it subsequent, is not Robbery. The reason of this is that the violence or putting in fear must be the means to



## Robbery.

Constitute robbery. 1 Hale 134. 1 Hawk 148 note.

And further the violence or putting in fear must be properly for the purpose of obtaining the property of another. 2 Mack 597. 1 Hawk. 148 note.

But it has been held that where a jailer put a prisoner in his prison for the purpose of extorting his money from him, that the jailer was guilty of robbery. Leach 266. 2 Mack 597.

As to the putting in fear it is a settled rule that so many <sup>menace</sup> gestures or threatening gestures as may reasonably excite an apprehension of danger, is a putting in fear within the definition.

But a fear altogether groundless is not a putting in fear within the definition. So where there is a physical impossibility of doing it - Leach 264. Porter 125. 1 Hawk 149.

Again such threatening as is likely according to common experience to excite an apprehension of danger to ones character or good name is a fear within the definition. Leach 199. 255. Porter 129. 2 Mack 589.

But for the purpose of exciting fear there is no necessity for actual violence or actual threatening, for it may be done by mere signs only, as by presenting a weapon &c.

1. If a man should compel another to sell his property at a mere

criminal nature the robbery. Leach 204. 1 B & A 243. 1 Hawk 147.

Whether compelling a Knight or other chapman to sell his property at full value is robbery or not is not fully settled. Hawkins supposes it would not be a robbery, but a misdemeanour. Hawk 149. 1 B & A 243.

There is a rule laid down in Keeling which says that taking property under legal process without a colour of right is robbery. But I should rather think it was simple larceny. Keeling 149.

I have already observed that it was not necessary that both violence and putting in fear be used to constitute this offence, tho' not necessary therefore to insert in the indictment that the act was committed by putting in fear tho' sufficient to insert that it was done by violence alone. Keeling 70. 4 B & A 243. Leach 204.

And where the offence is said to have been committed by putting in fear tho' not necessary to prove actual putting in fear for such circumstances of violence as are calculated to excite fear are sufficient. Miles 123. Leach 206. 206. 1 Hawk 147.

Whether openly taking the goods of another person without violence or putting in fear is larceny of any kind is not fully settled. According to Hawkins this can't be larceny of any

## Robbery

kind, as where A meets B and A takes his hat from off his head & runs away with it - now this can't come within the definition of larceny of any kind. Ray 275. Hawk 150. 149 note.

I should think however this might be considered as simple larceny. It has been decided that an indictment for Robbery on the highway is not supported by evidence of Robbery in a shocking house. Leach 58. 2 Hawk 599.

Robbery at common law is a capital felony, it was also a deplorable one at common law. But is now voided of death by Statute and accepted before the fact. 1 Hawk 149. 4 B & 243.

To convict Robbery is punished precisely in the same manner as Burglary is. Statute 184.

## Forgery.

Forgery or as it is termed at common law by way of eminence the counterfeiting is the fraudulent making or altering of a writing to the prejudice of another's right. 4 B & 247.

Formerly there were a great number of writings not subjects of forgery as notes, Bills of Exchange, orders &c. 1 Hawk 335. 343. Ray 51. Mudge 69. Hawk 210.

But is now settled that any writing by which another's rights may be prejudiced is a subject of forgery at common law. 2 D. Ray 465.

1807 37 B. Hodge 747.

And it has been determined that the fraudulent making of a bill of exchange on unpurposed paper is forgery, for every man may not know what the law on this subject is, and is therefore liable to accept one. 23 A 666. Leach 240. 2 March 480. 2 change 901.

But now by a variety of Eng<sup>l</sup>. Acts almost every species of writing is made a subject of forgery and ousted of the benefit of clergy.  
1 B6 247. 1 March 330.

Our Stat in Council includes all private writings in general. Stat. 184.

Thus far as to the subjects of Forgery.

The offence consists in the "fraudulent making or altering &c" now very little need be said as to the making, alteration of writings. The words themselves are a sufficient explanation as to this part of the definition. 1 Black 336.

If one employed to write a will insert false legacies, he is guilty of forgery. 1 Black 336. 2 Bac 567. Reg 101. contra Reg 255.

In the case above however it must be presupposed that the testator signs the will.

So also if one should write an obligation or release &c over another's name which he should find, he is guilty of forgery.  
1 Black 336. 2 Bac 567.

Mandaciously subscribing another's name to an instrument already drawn is forgery, say if one makes a mark for another



### Forgery.

with a fraudulent intent to forge. Leach 61.

It is not necessary to constitute forgery that the writing should be such an one as would be effectual if it were genuine. So if one should make a will for another he is guilty of forgery before the Testator dies, at which time the will is to take effect. Leach 103. 391. 2 Mack 433.

If one inserts in an indictment the name of a person whom the grand jury did not present. So if in an indictment against a number of persons the name of an innocent is inserted, this is a forgery. 1 Hawk 336. 5 mod 192. 300 66. 12 Geo 493.

It is a general rule that the fraudulently altering of a writing in a material part is forgery, or in other words, a fraudulent alteration in a material part, is an alteration within the definition. 1 Hawk 336. 2 Bac 567. Moore 619.

But this distinction is not well taken in the books between the alteration of a part material, and a part immaterial.

It is said one may be guilty of forgery by making and executing a deed in his own name. As if A after having given a deed of a piece of land to B, should afterwards deed the same piece to C by antedating the deed. 1 Hawk 336. 2 Bac 566. Ray 101. contra Dyer 288.

If one having found a bill of exchange forges an indorsement in order to get it discounted, he is guilty of Forgery

Forgery.

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and is sufficient if merely with the name of Page upon it.

2 Do. Ray. 146. 1 Hawk 210 notes

But tho the fraudulent making &c is a forgery, yet if one writes an instrument in another name and signs and seals it in the latter's presence and by his consent and direction, he is not guilty of forgery. and I presume if it were done in his absence it would not be forgery provided it were done by his direction. 1 Hawk 337.

The making and alteration of a writing must be fraudulent to constitute Forgery. There are many cases, which from their nature are not forgeries - as if obligee of a bond should alter pounds into shillings, it would not be forgery - So also if the Promiser of a note should do the same. It is said in Hawkins reports that this is a misdemeanour, but I do not see upon what principle it is, unless to a principle of policy. 1 Hawk 337. reg 99. 3alk 375. West 94. But tho the alteration in the above cases would not be forgery still the Bond or note will be avoided. 11 Co 26. 2 L 224.

Now, far an immaterial alteration is considered as a forgery I shall not take notice of at present, as that is involved in the question which I gave you for disquisition.

However a mere non-parasance cannot regularly amount to Forgery, tho tho intent be fraudulent. So if a Surviver should omit to insert a legacy in a will, it would not be forgery.

## Forgery

As a general rule the making or alteration must be a positive act. Thus if a person employed to make a will was directed to limit an estate to B after the determination of a particular estate for life, and he should not create this particular estate but give it to B to commence instantly it would be forgery. May 101. 1 Mark 337. Moore 760.

It appears to me that in the forgery example that making was a positive act, tho the law deems it an omission.

This fraudulent making and altering is required to be to the prejudice of another's right. But by this is not meant that an injury should actually be done, tis sufficient if the act in itself tends to the prejudice of another - thus if it forges a note against B tis not necessary that this note be put in suit to make it forgery. The forgery is completed when the instrument is written. Leach 155. May 751. 2 Leach 1461. 1466. 100737.

But tho a fraudulent intent is necessary to constitute the offence, yet tis sufficient to aver the intent generally without specifying out the particular mode by which the particular fraud was to take effect. Leach 76.

Tis not necessary that forged instruments should be published, or that any claim should be made upon them in order to support a prosecution. 2 Leach 1461. 1466. Manger 747.

It has formerly been a question whether forging an instrument in

the name of a petitioner whose was forged, or not. but he was satisfied that it is. Leach 53. 182. 216.

The rules of pleading require that in the indictment the forged instrument must be set out in words and figures, precisely as it was originally written. And it is a general rule that the least variance between the original forged instrument and the recital of it in the indictment is fatal.

This rule however is not literally true, for where there was a mistake in the spelling of a word which did not alter the meaning, it was not fatal. Corp 229. Leach 46. Marge 231. 787. Talk 660. As to variance 1 East 180 note Leach 76. 146.

When the indictment describes the instrument as purporting to be an instrument of such a description, the indictment will not be supported unless when produced it does purport to be such an one on the face of it. 1 East 180. Leach 209. Long 287. 302.

At common law forgery is not a felony and is punished by fine and imprisonment. But by Stat it is almost in every case punished with death and it is rarely even the case that one is pardoned. 4 B & 247.

In Connecticut this offence is punished in the same manner as Burglary - and the injured party has double damages - the offender is also rendered incapable of being a juror or a witness.



## Forgery.

### Statutes of Convent-1841.

Under our Stat. in Convent the making of any writing is not forgery unless when done to prevent justice and equity. This however does not differ materially from common law definition.

The word attesting is not used in our Stat, however, the word making includes it, and I suppose in strictness of language the attesting is a making.

Our Stat also prohibits and punishes as Forgery the uttering & publishing a forged instrument knowing it to be such.

## Perjury.

Perjury is defined to be a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely, and falsely in a matter material to the issue or point in question. 4 B & 137. 3 Inst-164.

### 1 Hawk 318.

The false swearing must then be wilful i.e. intentional and with some degree of deliberation. The word wilful here seems to have the same meaning as the word intentional. 1 Hawk 319. Salt 513. 4 B & 137.

This swearing must be in some judicial proceeding i.e. the false testimony must be given under oath and in court or before some officer authorized to administer it, and in some proceedings relative to a suit or prosecution. 1 Hawk 319. Cro & 168. Holt 62.

is immaterial whether the court is a court of Record or not in which false testimony is given. 12 Co 101. 1 Hawk 319. 2 Brin 1189. Leach 58.

But cannot all our courts are courts of Record.

But the oath must be taken in some judicial proceeding. So any voluntary extrajudicial oath is not perjury. 1 Hawk 320. Yeld. 72. 3 Inst 166. 4 BB 137.

But tis not essential that the perjury be committed in a court during a trial for tis settled that perjury may be committed in an affidavit or deposition, tho they are never used in court for they are relative to the proceedings &c. 1 JR 310.

Again Perjury is confined to facts public rather as doing or saying some matter of fact - tis not predicible upon promissory oaths as oaths of office. 1 Hawk 320. 3 Bac 514. 3 Inst 166.

But Perjury is predicible upon any false oath material to the point in question, tho the point may not immediately affect the final judgment. 1 Hawk 320. 4 Co 1146.

I have already observed that the violation of mere promissory oaths is not perjury. So a juror who does not give in a true verdict is not guilty of Perjury. 1 Hawk 322.

But a party in a suit when allowed to take an oath may be guilty of perjury as well as any indifferent person. So if a

Perjury.

Def't in Chan't puts in a false answer, his perjury. perjury.

In Connect however Def't in Chan't are not put under oath when they put in their answers unless the Plff seeks a disclosure, in which case they are put under oath.

Plff in ordinary cases the Def't is bound to verify his answer by proper testimony. In Connect both Plff and Def't are allowed to swear to a Book debt or to an account - so here they may be guilty of perjury if they swear false. But cf P 239. 2 Mack 470. Co 8609. 2 Noble 462.

If a witness having testified what is false corrects himself, he is not guilty of perjury even tho he intended to testify falsely, and this rule is in Eng<sup>d</sup> extended to a supplementary answer to a Bill in Chancery. 1 Ed 418. 2 Noble 56. 2 Mack 474.

It is said not to be at all material whether the fact be proven to be true or false provided the witness does not know it to be true, for he is to answer to what is within his knowledge. Palm<sup>r</sup> 294. 3 Moo 222. 1 Baski 322. 6 IR 637.

There is one word in the definition which seems now to be useful tho not so formerly. I mean the word "absolutely" for his now settled that a man need not testify absolutely in order to be guilty of perjury, for if he swears to a fact according to his best

of his recollection - or he believes it to be so, or he thinks it is so &c of  
in such general phrases he testifies falsely, he is guilty of Perjury.  
to the word "absolutely" in my humble opinion says Mr. G. is now  
wrong. 1 Hawk 323. 3 Bac 815. 3 Inst 166. For the rule see Leach 301.

Mack 262. 2 Bl R 885. Cas. l. 229.

The swearing must also be material to the question i.e. it must  
be to a material point. If then a witness testifies to a fact alto-  
gether unimportant to the point in issue he is not guilty of Perjury  
in a legal point of view, for it does not tend to prevent the  
Administration of justice. 1 Sid 274. 2 Leach 255. Hobart 53.

Bro. t. 500. 1 Hawk 323.

But if the false testimony the circumstantial and not direct-  
ly applicable to the point in issue, tends to aggravate or ex-  
acerbate the damages to perjury. 12 Co 101. Cas. l. 22. 3 Bacon 815.  
1 Hawk 323.

If the false testimony in a point not material in itself tends  
to make the jury more readily believe any material point, such  
testimony is Perjury. 1 Hawk 324. 1 Leach 258. Palm. 7382.

But there are many circumstances especially in cases of torts  
which are not material and upon which Perjury is not predicable.



Fajury.

Is if a witness testifies that one sort of weapon was used in a Battery when in fact another sort was used to wit fajury. But I conceive if testimony of this kind tends to exonerate or aggravate the damages, it would be fajury. 1 Hawk 323.  
Comm 147. old Edition.

But tis not essential to show in what degree the evidence was material, if it was circumstantial tis sufficient.  
Lo. Ray<sup>d</sup> 258. 889.

Now tis always incumbent on the prosecutor to prove that the evidence was material. The Prisoner is never bound to prove it. 1 Hawk 325. note. 305.

Is necessary that the record be produced to show the judicial proceeding, and the Verdict is sufficient for this purpose, tis not necessary that judgment should be rendered before the record may be produced, tho in ordinary cases judgment must be rendered before the record can be produced as evidence of any thing.  
2 Hawk 468. 635.

The cause in which the fajury was committed must be set forth in the indictment and also what he testified. Ray 170.  
1 Hawk 289.

Is not necessary to constitute the offence that the false evidence should have been credited by the jury - of course

it is not necessary that any person should be actually injured by it. 2 Leard. 211. 3 Do 230. 3 Bac 815.

It has been decided in Eng<sup>d</sup> that the word "wilfully" is not absolutely necessary to be inserted in the indictment - the words "feloniously" and "maliciously" are sufficient. Leach 69.

For the purpose of convicting one of perjury to a rule of law that there must be at least 2 witnesses or one there would be oath vs oath only. 10 mod 195. 1 Mack 37. 2 Do 635.

It is now pretty well settled that circumstantial to the fact that the Def<sup>t</sup> has sworn to can be admitted. This must be proved by direct testimony. 2 Mack 471. The evidence to the fact of his swearing is all that is required to be direct.

Perjury can't be committed by 2 persons jointly, therefore there can't be two persons joined in the indictment. Manger 623. 870. 921. Cowp 494.

But two persons may be guilty of subornation of perjury, and both may be joined in the indictment. 2 Add Ray 2886.

Subornation of Perjury is the offence of procuring another person to commit perjury.

But in this case Perjury must be actually committed, for

## Pjury

an unacceptable attempt does not amount to subornation of Pjury, but is only a misdemeanor. 1 Brist 325. 4 B & 137. 3 Wm 122.

Pjury and subornation of Pjury in Eng<sup>d</sup> are punished with fine and imprisonment and legal infamy. 4 B & 138.

Legal infamy is a consequence of Pjury at Common Law. 3 B & 303.

When the Pjury is asigned upon an affidavit or deposition the least variation between the recital and the original deposition or affidavit will destroy the indictment. Corp. 229.  
11 R 237. 1 alt 660.

Under our Stat Pjury and subornation of Pjury is punished by a penalty of by cells, and imprisonment in Newgate for 6 months, and if a female imprisonment in a common jail.

The legal infamy is part of the judgment also. If unable to pay the fine off by cells, he is to set in the Pillory one hour.  
Stat Count. 339, 340.

Under our Stat the Pjury must be committed in some court of record. But as there may be cases of Pjury which would not come under the Statute I suppose in such cases they might be prosecuted at common law. Our Stat also provides that the false affirmation of a Quaker shall be punished as

perjury. It also provides that if one swear up and upon false testimony procure another to be put to death he shall suffer death himself. Stat. Connect. 182.

I shall now consider the criminal jurisdiction of the courts in this State.

The highest court of ordinary jurisdiction in this State is the Superior court. The Super. court has jurisdiction of all offences which are punished with death the top of birth - Barribment - and the punishment which relates to Adultery & confinement in New Gate.

The Sup. court has exclusive jurisdiction as to the above except confinement in New Gate and here the county court. have concurrent jurisdiction only in the case of horse stealing.

Stat. Con. 30. 127. 129. 186.

In cases of Riot also the Sup. and county court have concurrent jurisdiction, and this and the case of horse stealing are the only two cases where the jurisdiction of the two courts is concurrent.

Stat. Con. 361.

The Sup. court has jurisdiction of all high crimes and misdomenors, but here the line of distinction is not well marked out between the cognizance of the two courts, for the county



## Criminal law.

courts in many instances, has cognizance of misdemeanors.

But the Superior court have determined that they have exclusively the cognizance of those crimes and misdemeanors which consist in an unsuccessful attempt to commit some high crime or offence. So an unsuccessful attempt to commit murder is a crime which falls within the jurisdiction of the Sup.<sup>r</sup> court. The Sup.<sup>r</sup> court has also exclusive jurisdiction over the higher offences against religion, as Blasphemy &c. Stat. Council, 183.

1 Stat. 95.

Court of Common Pleas - One that provides that the court of common pleas shall have cognizance of all offences inferior to those which are within the cognizance of the Sup.<sup>r</sup> court, and superior to those which do not fall within the jurisdiction of a single minister of the law.

The court therefore has cognizance in ordinary cases of misdemeanors. Stat. Council 129.

There is no appeal in criminal cases, from the county to the superior court. Stat. 269.

Single Ministers of the law as Justices of the Peace and Justices, have cognizance which is originally exclusive of all crimes of

which the punishment does not exceed a penalty of 70 shs. except in case of theft on the value of 11 shs. for then they have no jurisdiction. This penalty must be limited for if his discretion they have no jurisdiction. Stat. 10 Geo. 2. c. 32.

Whipping is the only corporal punishment which single magistrates can inflict. Stat. 10 Geo. 2. c. 32.

But Stat. law provides that all justices of peace shall have cognizance of all breaches of the peace unless aggravated, <sup>by</sup> force high handed and notorious violence, in which case he is to bind the party over. Stat. 10 Geo. 2. c. 32.

Single ministers of the law act as courts of inquiry in all criminal cases above their own jurisdiction. Stat. 10 Geo. 2. c. 32.

An appeal lies in favour of the prisoner only to the Court of Common Pleas in all criminal cases except those expressly prohibited by Stat. Stat. 10 Geo. 2. c. 32. 155. 197. 255. 270.

In criminal cases, the jurisdiction of a justice of Peace extends through the County so far as in civil cases for then he is confined to the limits of his own town. 2 Rest. 357.

All officers are liable only in the County in which they are committed. Officers are local. Healy 401. Herling 78. Dong 160.

We now consider the subject of trial in criminal cases.

### Bail.

I shall say very little on this subject as a great deal of the law respecting bail consists in mere practice.

When one is arrested for a crime he is to be brought before a Magistrate who has not the jurisdiction of the crime, who is bound to inquire into the fact charged, and see whether he ought to be taken to trial. 4 B & 296.

The Magistrate cannot in such cases examine the prisoner as to the fact of his guilt this in Eng<sup>d</sup> this is authorized by Stat. 4 B & 287. 296.

If upon the preliminary inquiry it appears that the offence has not been committed or that the charge against the prisoner is groundless the Magistrate is bound to discharge him.

But when there is slight or presumptive evidence against him, the Magistrate is to commit for trial or admit him to bail where the offence is bailable. 4 B & 296. Stat. 144.

Bailing is the delivery of the prisoner over to sureties, on their giving good security that he shall appear at court and take his trial. The Bail are considered as his keepers.

In those offences which are not bailable the Magistrate is to commit the prisoner to remain till the sitting of the next court. All offences as a general rule below felony are bailable, unless bail

is expressly prohibited by Statute. 4 Bb 297. 2 Hale 127. 1 do 97.  
see 1 Com 463. 1 Bac 220. 4 Bb 298. as to what was formerly considered  
as bailable offences.

But by Stat Bail is denied in the offence of treason and in many  
felonies under these Statutes.

It is a general rule that Bail is taken away from all felons where  
the facts confess, or is notoriously guilty. 4 Bb 298.

But the court of Kings Bench and any one of the judges in  
vacation has power to admit any person to bail for any offence.  
1 Cr 333. 1 Ann 2179. 2 Hawk 175. Salk 165. Stra 591. 1242.

But the court do not admit to bail in offences which are not  
bailable only in particular cases of necessity. Leach 122. Cr 333.  
Mange 49. 543. 2 Hawk 157. 175.

But it has been settled in Bag<sup>o</sup> that after a conviction of the  
treason, by verdict he must be admitted to bail unless the pro-secu-  
tor gives his assent to it. 1 East 159. Black 59.

But in Council this rule is not observed - under our law all offences  
are bailable except capital ones, and for contempt of court.  
Stat Council: 420.

It is a general rule that he who has the special cognizance  
of the offence may in any case admit the person to Bail - tho  
forbidding it notwithstanding.



### Bail.

However the court of King bench never do thus admit contrary to  
Statute unless when there are some special circumstances to favor the  
Prisoner. 2 Hawk. 448. 2 Penn. B. 426. 425.

In Connect. I trust every our Sup. Court and every one of the judges  
in vacation may admit any person to Bail even in capital offences,  
the Stat. forbidding it notwithstanding. But I presume they would  
be governed by the same rules which the Court of King bench adopt  
in such cases.

The Ministerial officer who makes the arrest can't take bail  
in criminal cases unless he has judicial power to do it.

In Eng<sup>d</sup> the Sheriff is a bailing officer for he has judicial power.  
But in Connect. the Sheriff has no such power and cannot  
procure bail.

In Connect. Bail is to be taken by the Magistrate who first  
examined the Prisoner, tho in capital offences he can't take bail.  
But after the Magistrate has procured bail, the Sheriff may take it  
and even after the prisoner is committed if previously procured  
by the Magistrate. Stat. Connect.

The Bail in criminal cases in Connect. is taken by different  
measures according to what court has cognizance of the offence.  
If the crime is cognizable by the Superior court Bail is

taken in the name of the State treasury. If cognizable by the court of common pleas, he taken in the name of the county treasury, and if cognizable by a single magistrate in the name of the town treasury.

If an officer takes insufficient bail and the principal does not appear, the officer is punishable at Com. law. 4 B. & 297. 2 Hawk 142.

The common practice in Eng<sup>d</sup> in case of felony is to require 4 trustees, and in inferior offences 2 only. 2 Hawk 141. note. 2 Hale 125.

No more than two families are required in any case.

Refusing bail when by law it ought to be allowed, and granting it when by law it ought to be refused is a misdemeanor at Com. law, and punished by fine, and in the former case the injured party has his action on the case for damages. 2 Hawk 143. 206. 1 Hale 196.

It has been decided by our Superior Court in a prosecution for Burgary, that where the Def<sup>t</sup> was out on bail after trial, verdict could not be given till he was present, and <sup>that</sup> the recognizance ought to be perfected. 1 Root 90.

I believe it to be a true rule that where corporal punishment is to be inflicted the prisoner ought to be present when verdict is given or his recognizance ought to be perfected.

But when a penalty is the punishment verdict may be given

## Bail.

When he is out on bail. 1 Mack 59.

Whenever a prisoner is prosecuted for a particular offence, is acquitted but is proved to be guilty of another offence, he is not to be discharged on the acquittal but the court are to keep him in custody till another prosecution may be brought against him. 1 Leach 360, 353.

## Costs in Criminal Cases

In Eng<sup>d</sup> no costs are taxed on either side except by express act of Parliament i.e. at Com law no costs are recoverable by either party in criminal cases. 7 R 367. Walters & Costs 25. 125. temp. 367

Under our law in England the rule is the same as to taxing costs in favour of the prisoner. The State pays no cost. But on the other hand prisoners in England are not only taxed on conviction but may be on acquittal, for the Statute made that if the prosecution was occasioned by any unlawful and blamable conduct of the prisoner, he shall pay the cost of prosecution even the acquitted. Stat. 1 Geo. 4 c. 26.

But if this does not appear he shall pay no costs on acquittal. When the prisoner is unable to pay costs they are to be defrayed out of the State treasury if prosecuted in the Super<sup>r</sup> County Court,

25.

So if the Prisoner is able, the State may pay them, and be afterwards reimbursed out of the Prisoner's pocket.

But when the prosecution is before a single magistrate costs are to be defrayed out of the town treasury. Not cannot little delinquents.

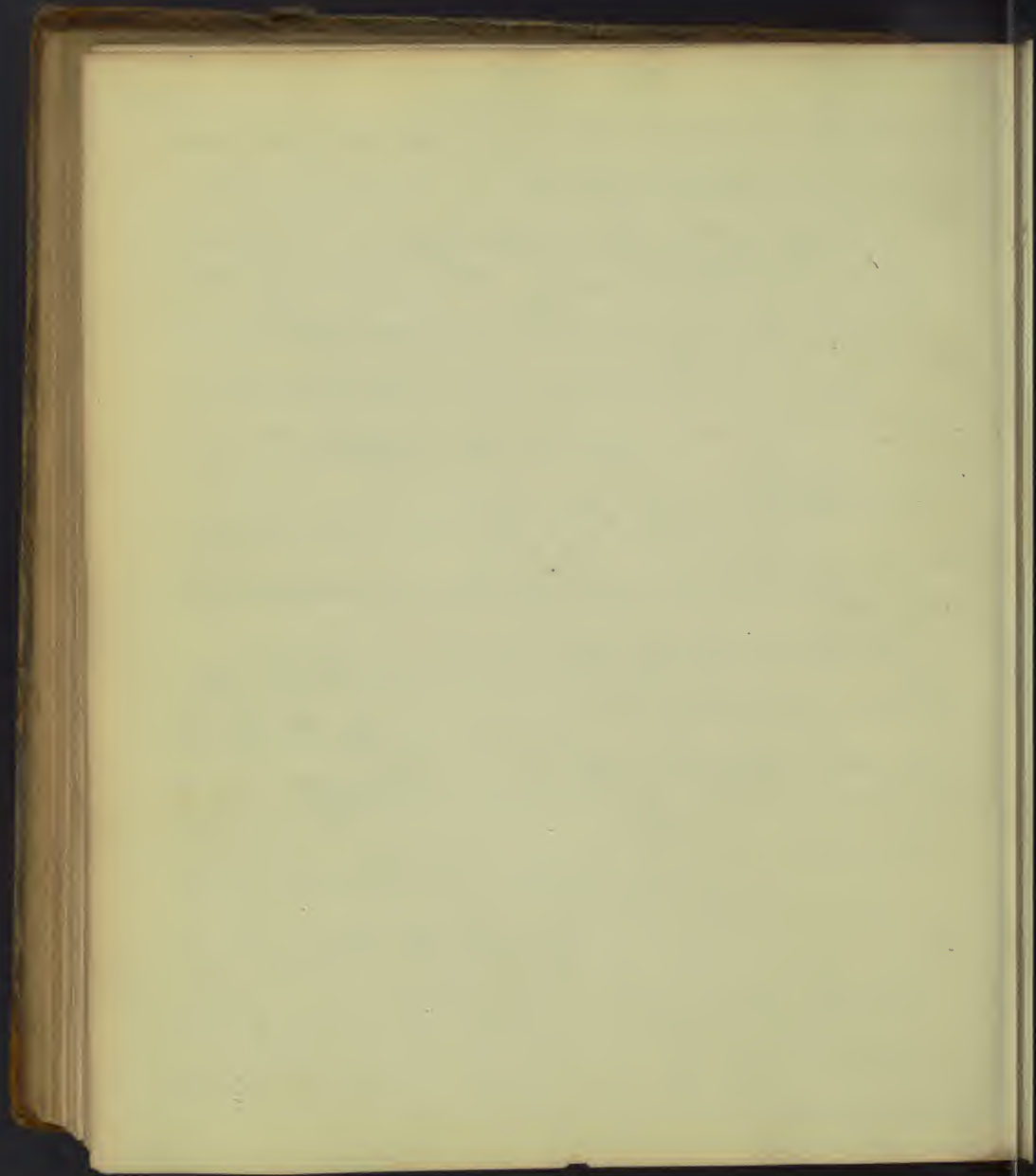
And on the other hand when costs are recovered by a prisoner these costs go into the State treasury if the trial was before the Superior or County Court, and into the town treasury if before a single magistrate.

The Stat also provides that if the prisoner is unable to pay costs he may be bound out in service till he has earned sufficient to pay them.

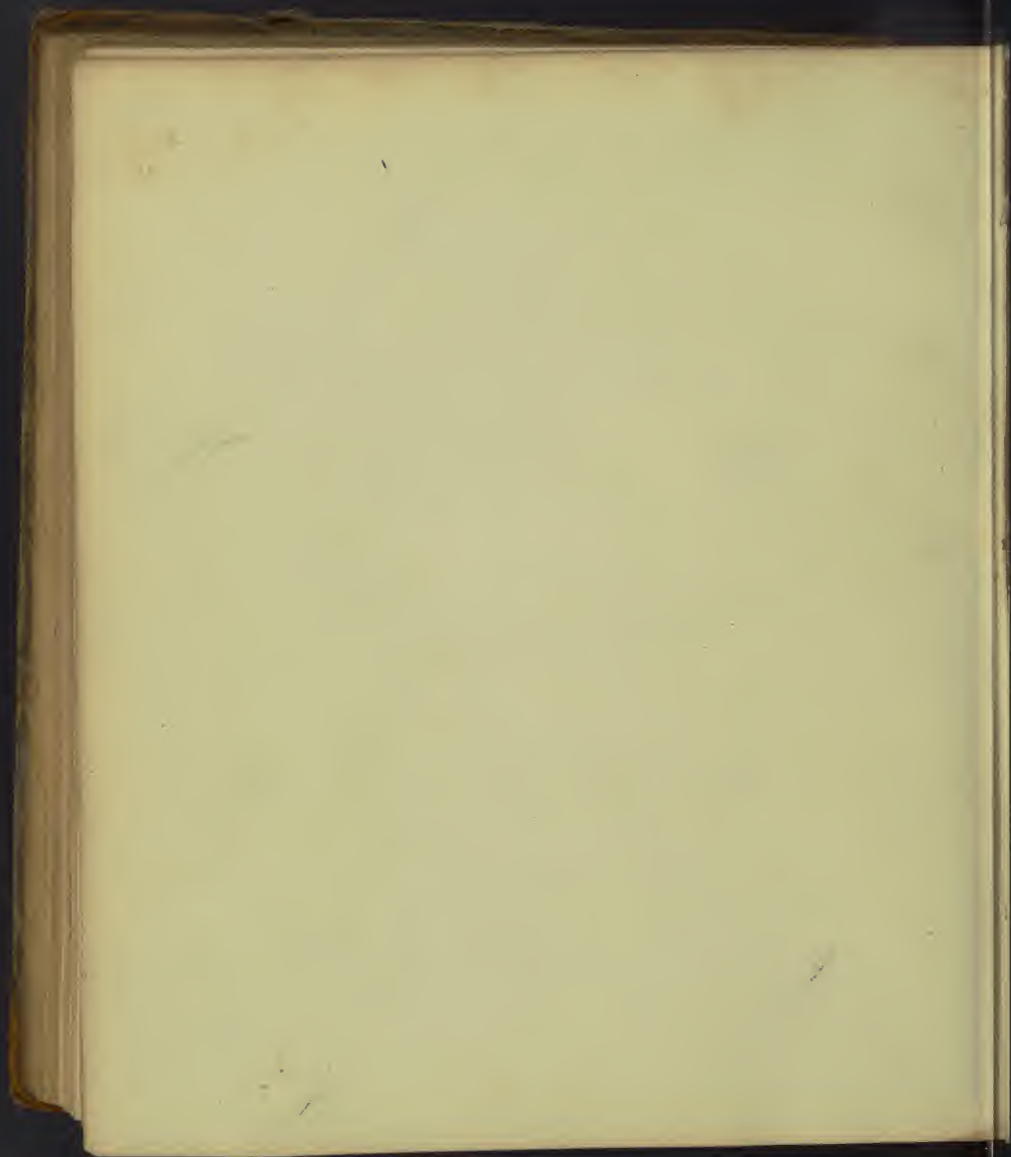
But the rule that the prisoner in some cases shall pay costs when acquitted does not hold when he is acquitted by a single minister of justice, acting as a court of inquiry. —

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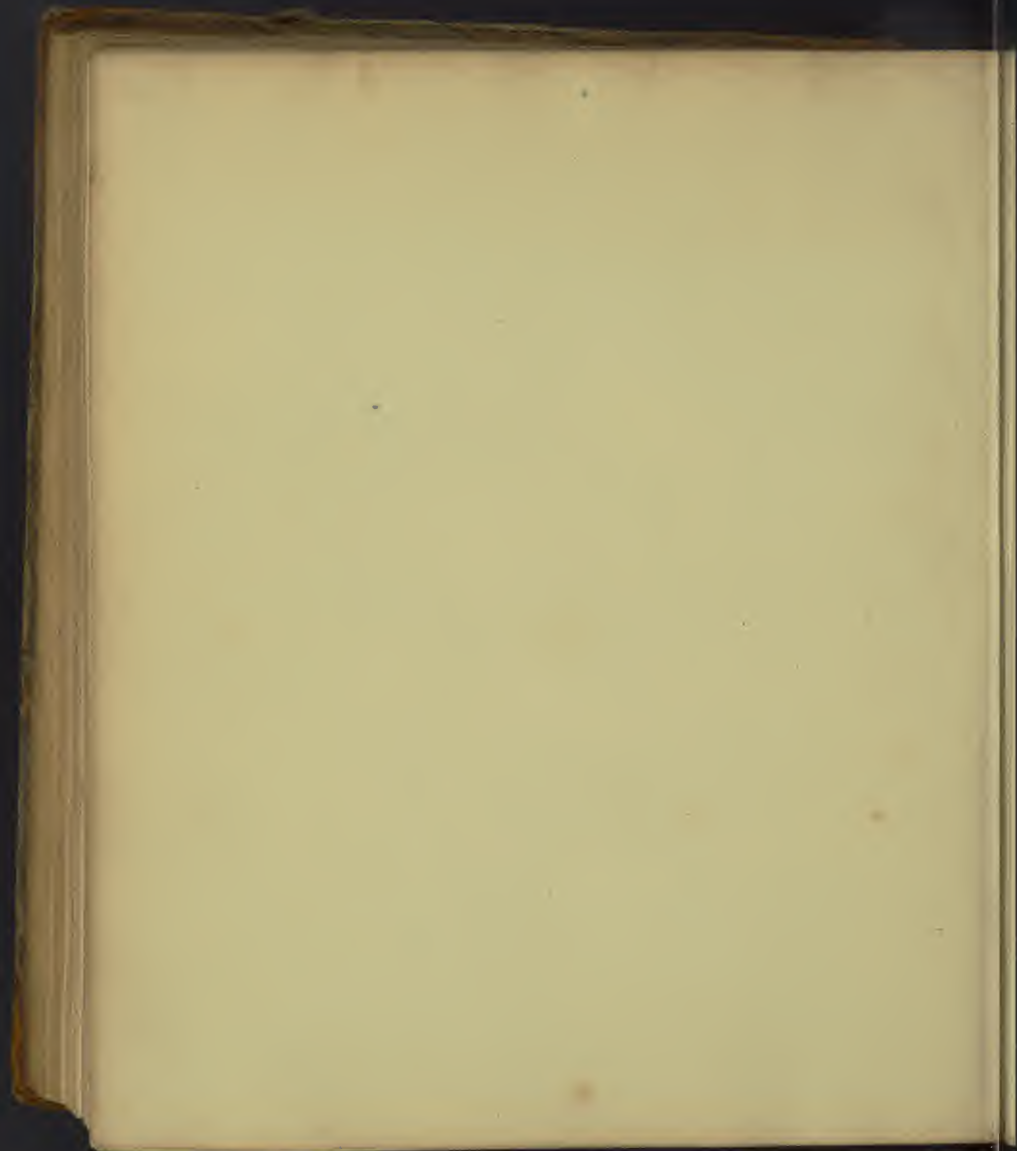


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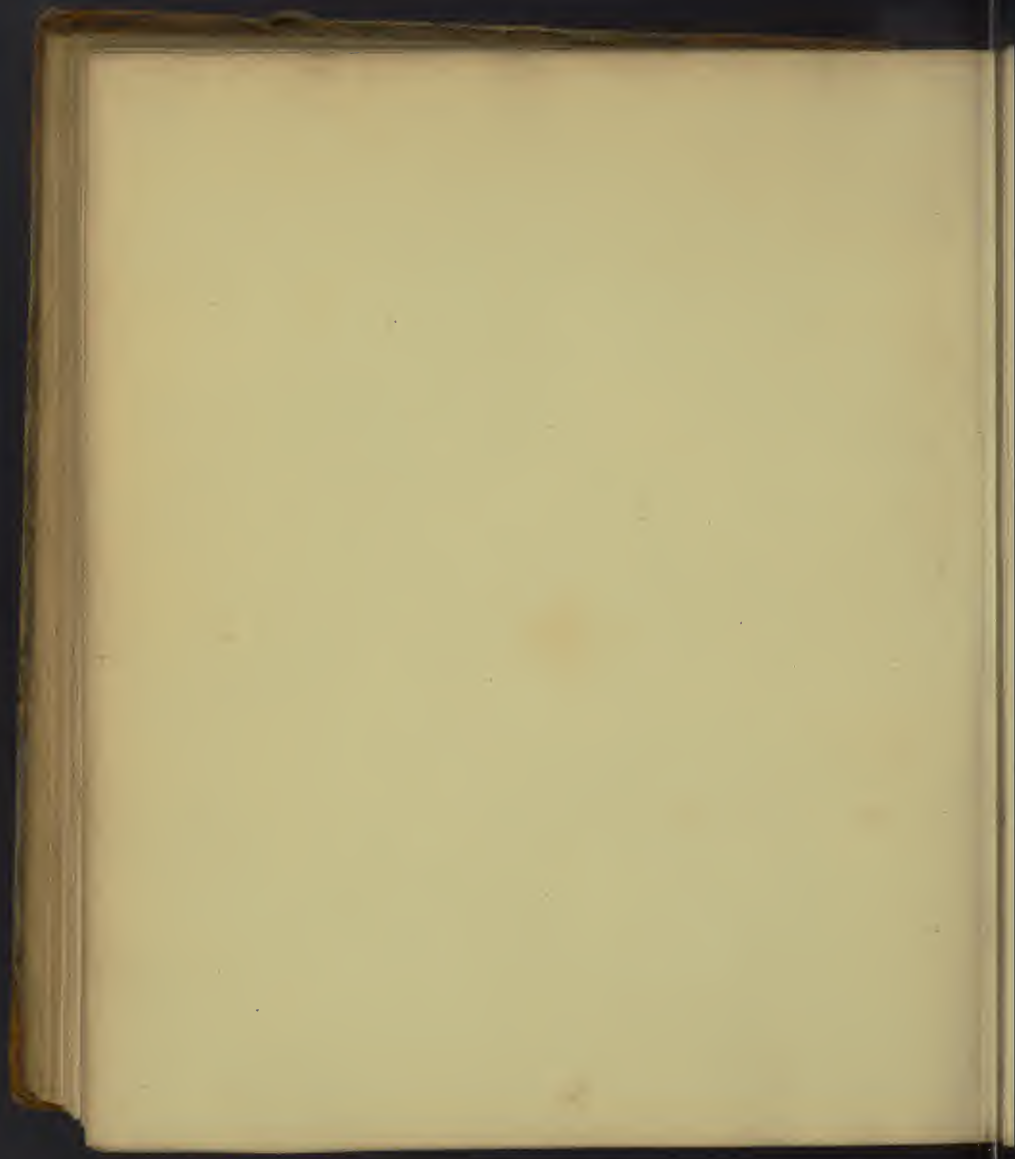


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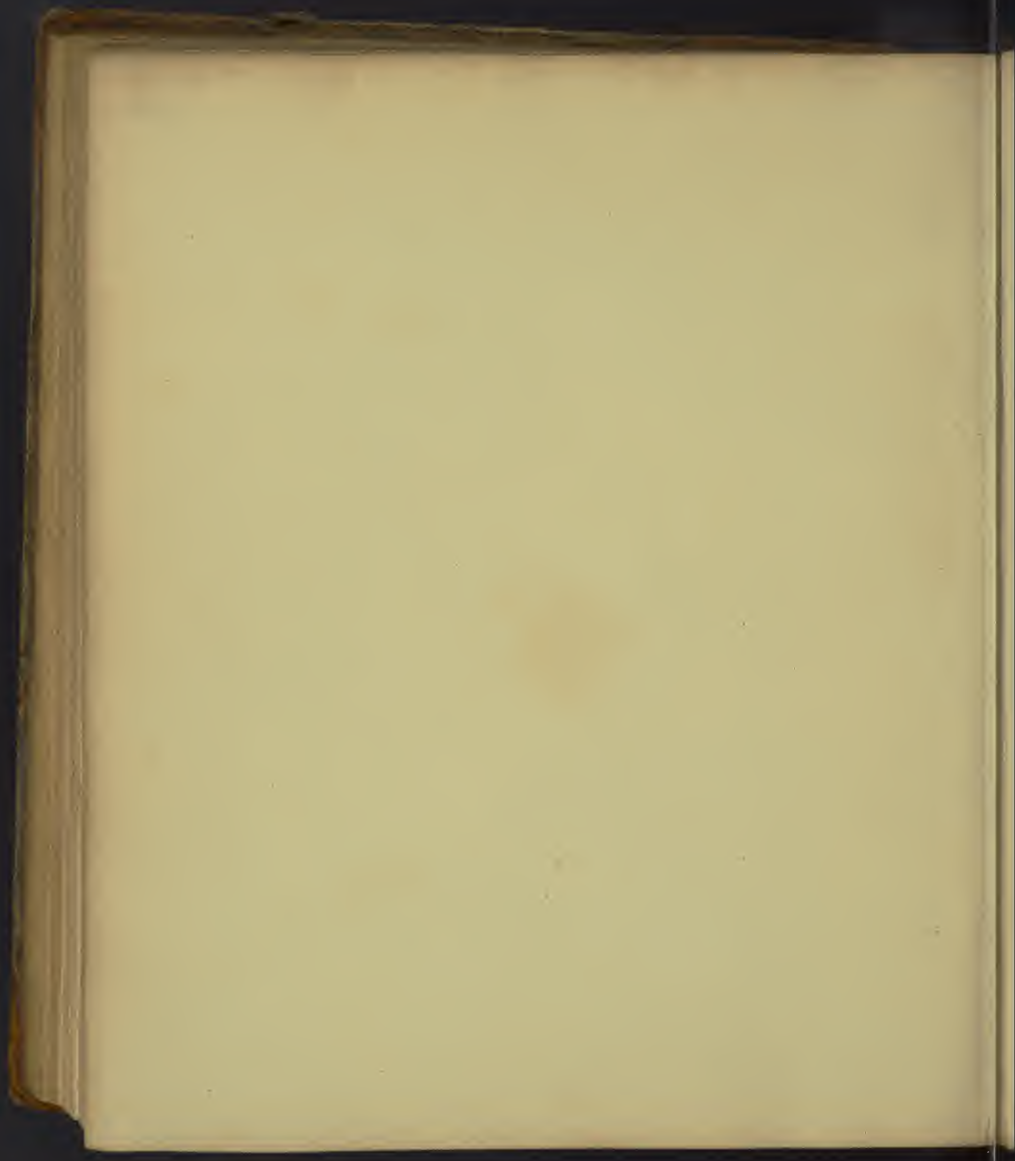






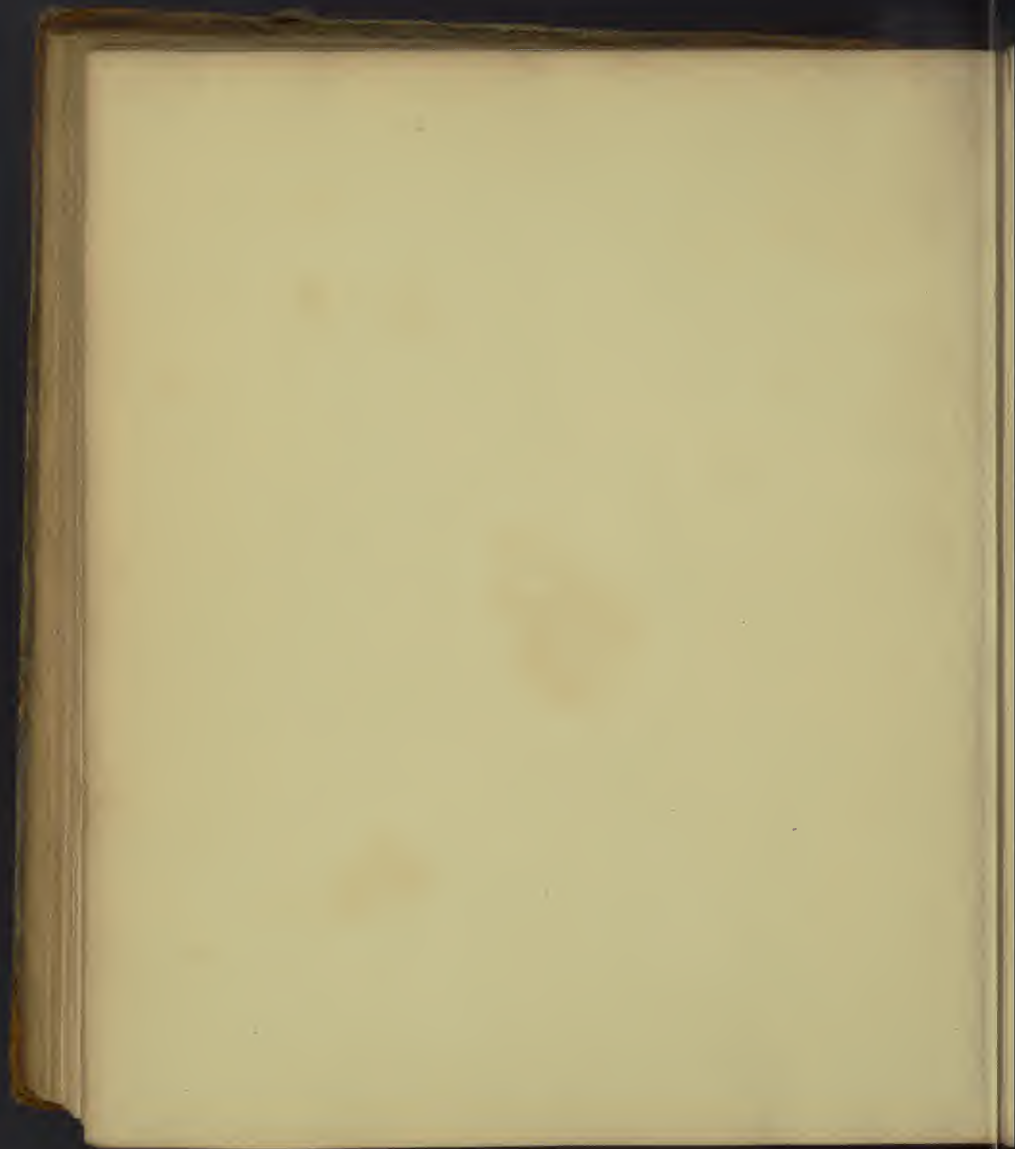




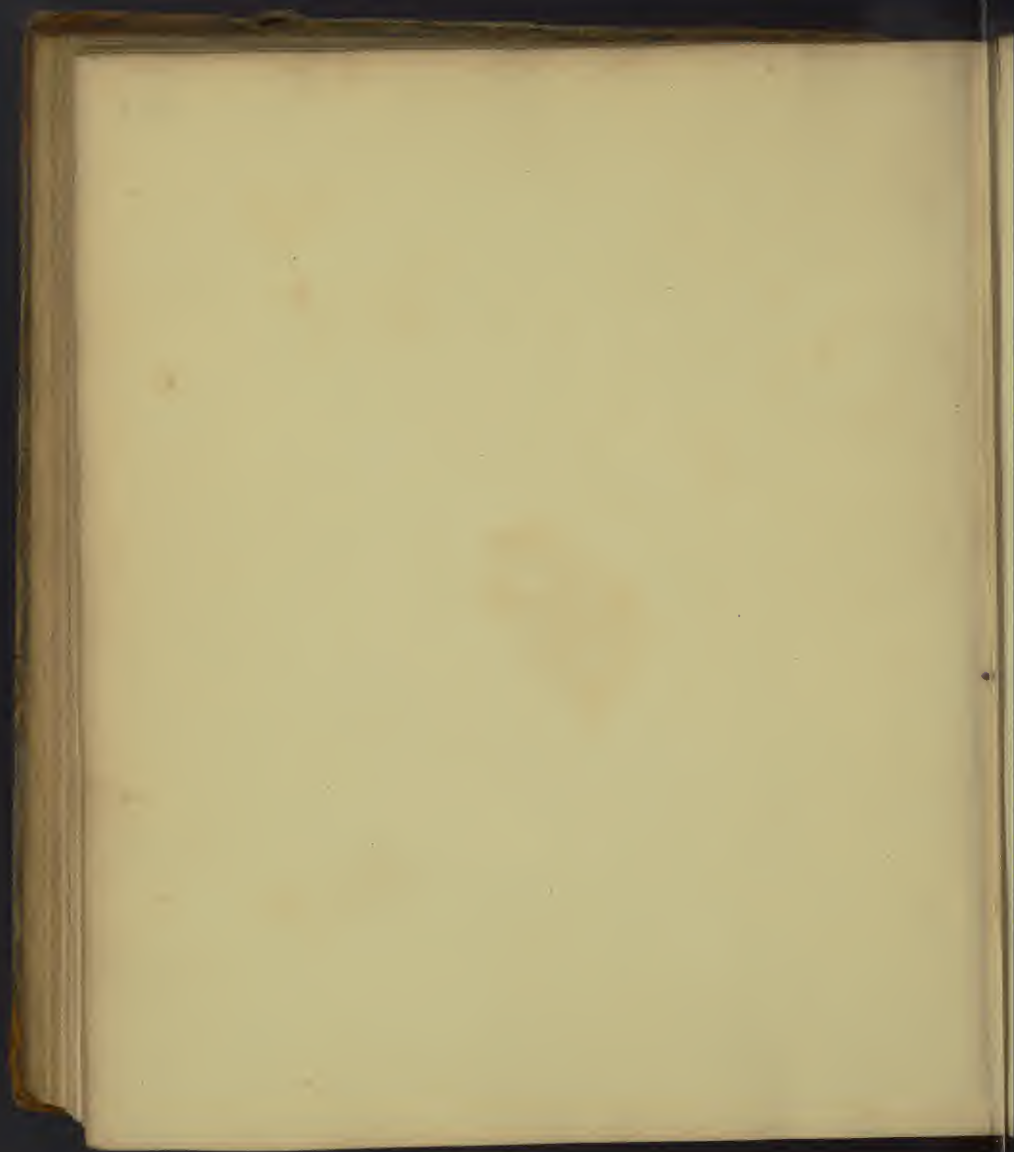






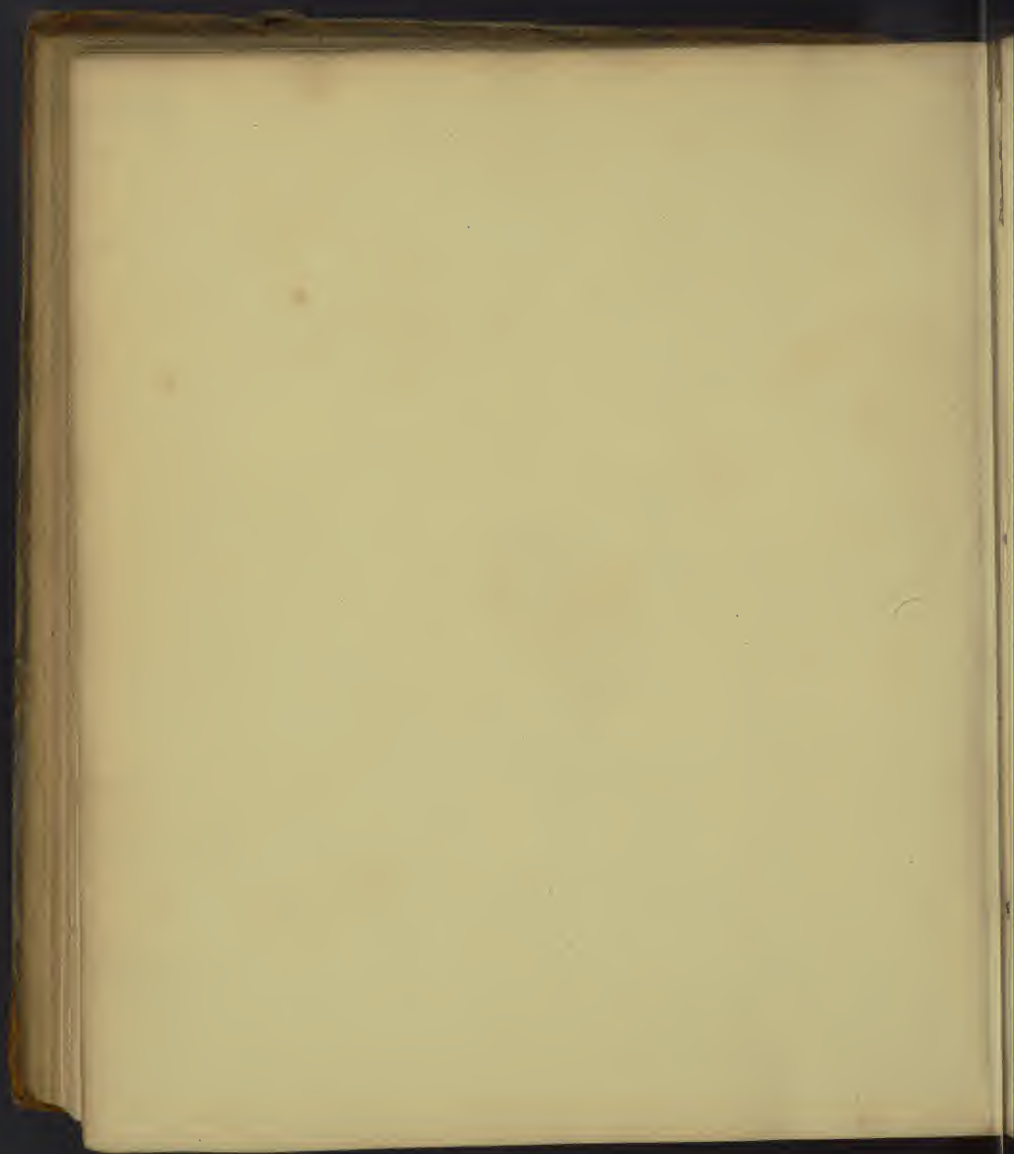


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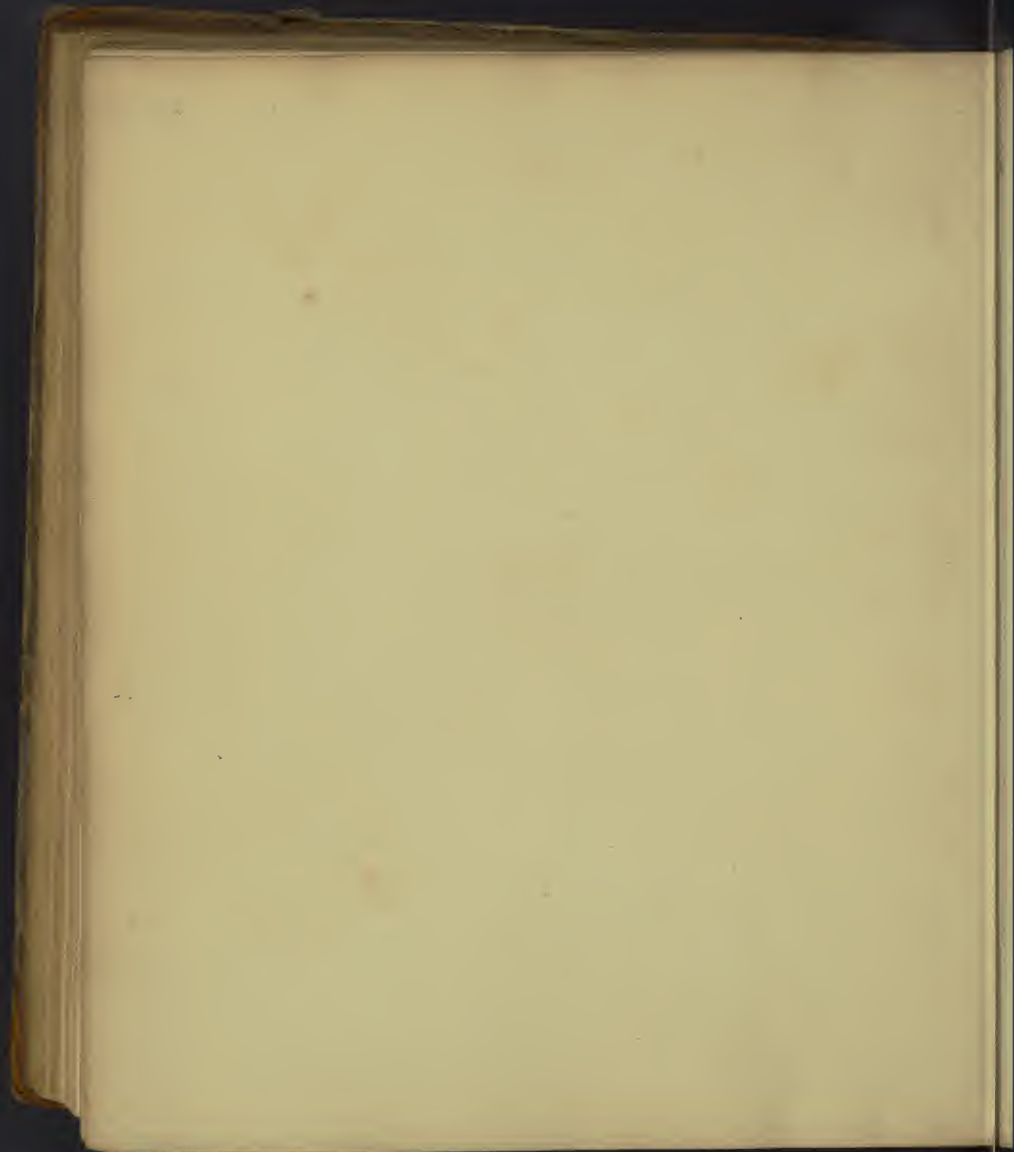


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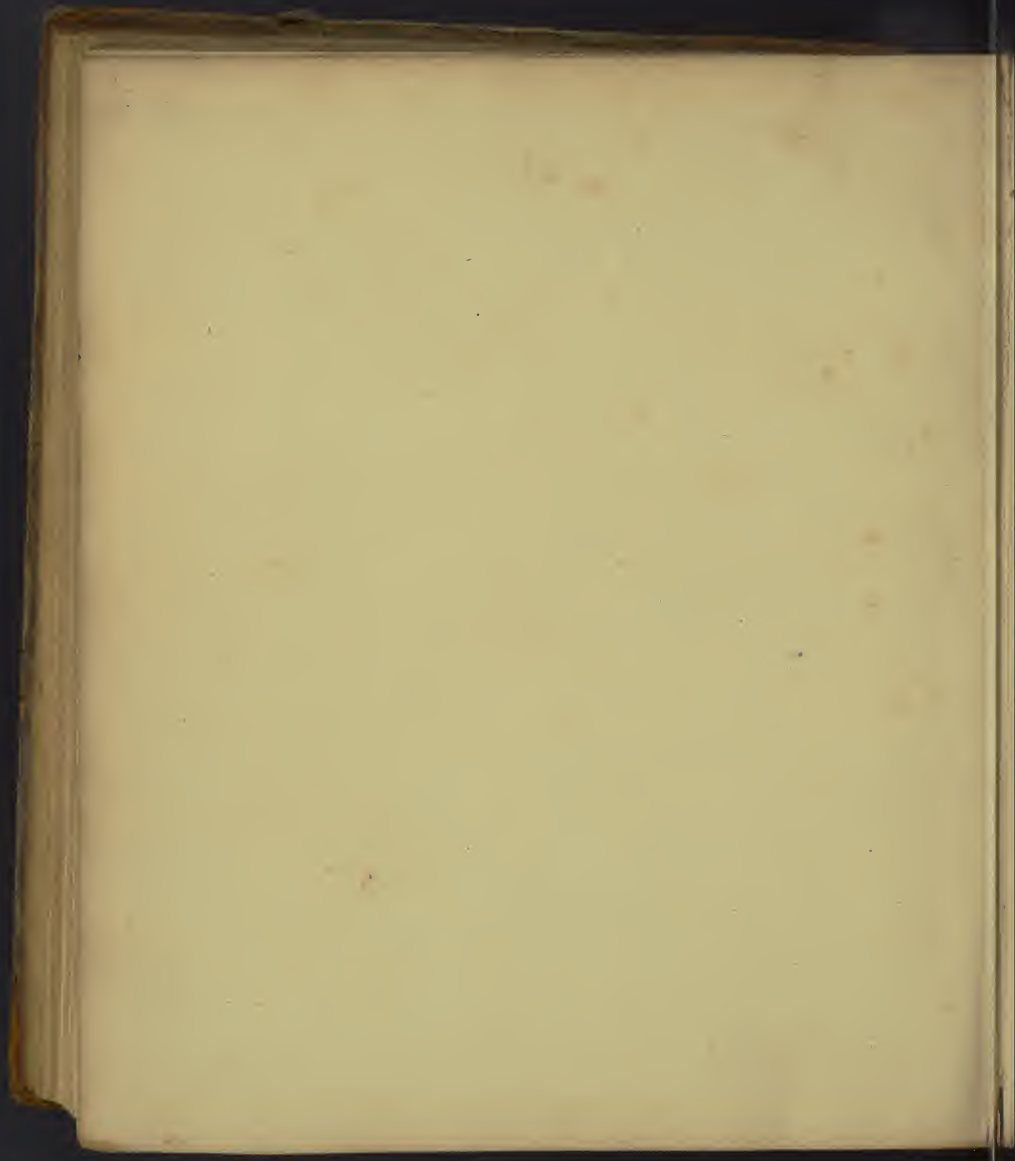


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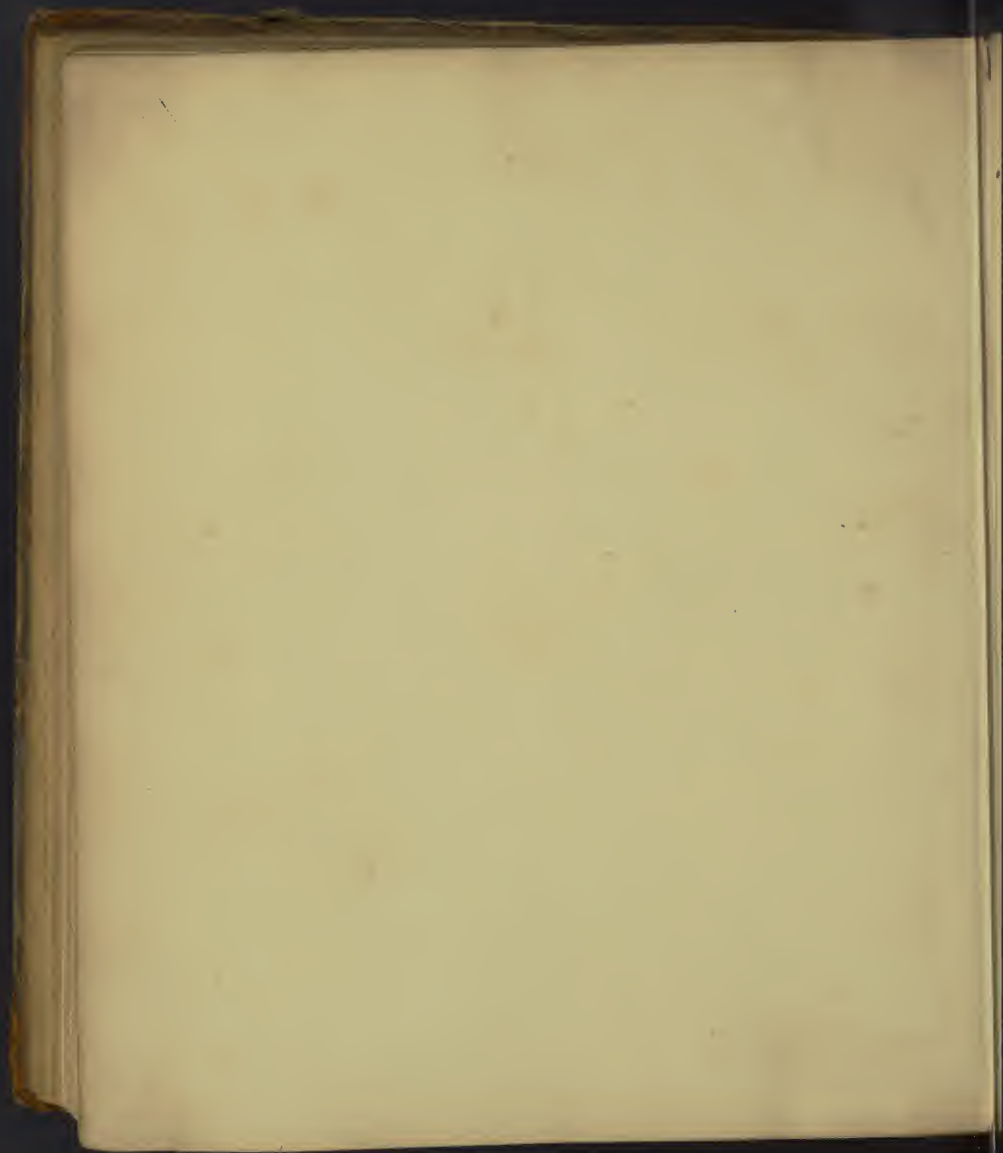


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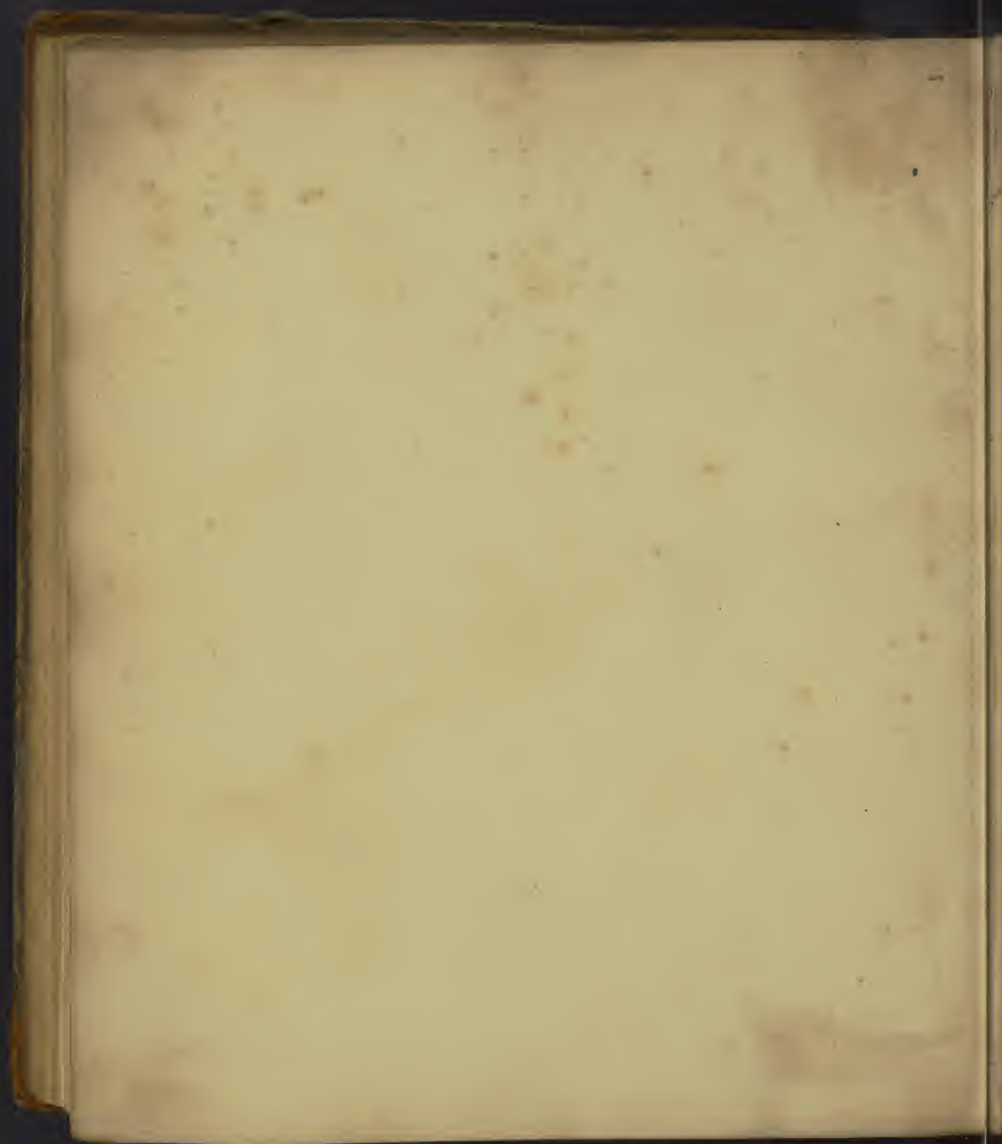


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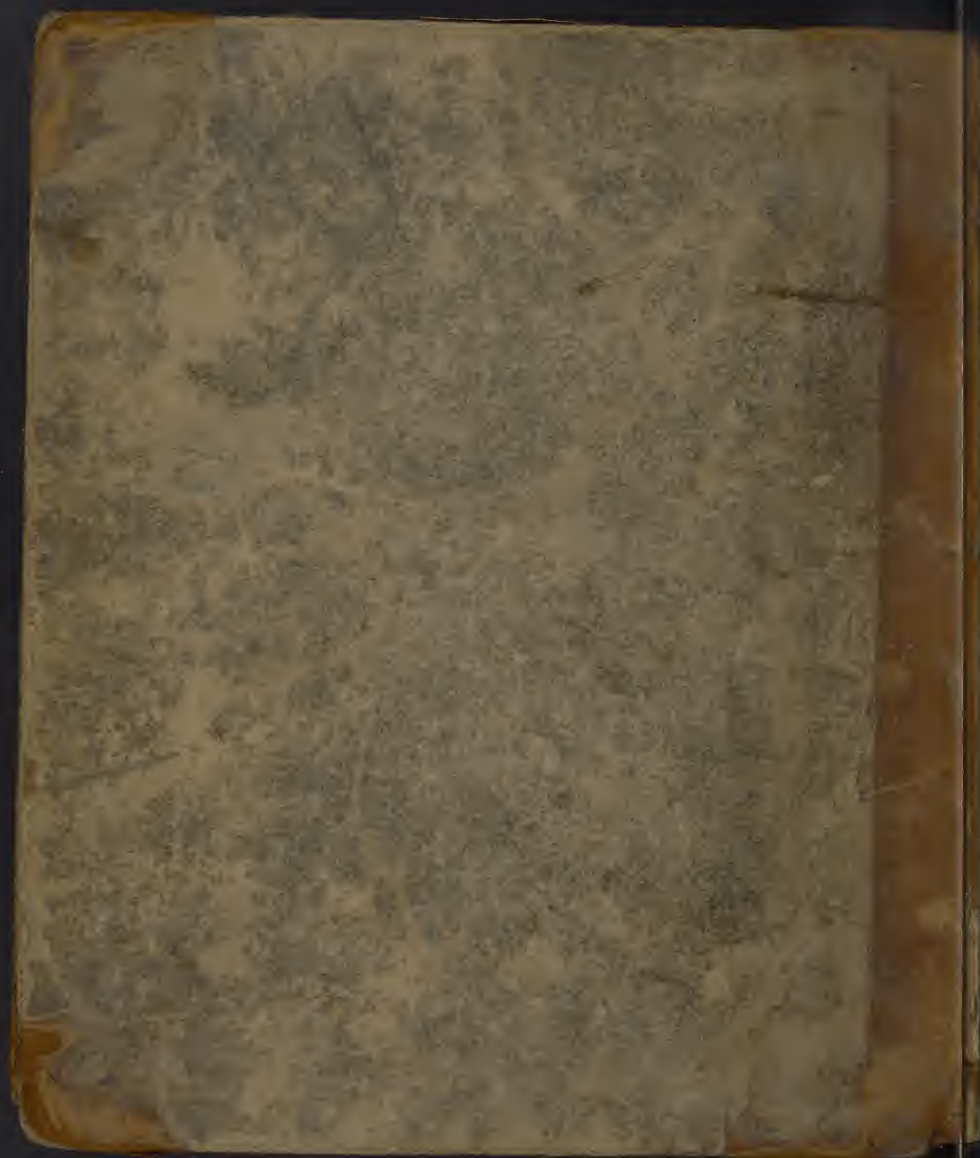


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